

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

September 26, 2013 at 10:30 a.m.

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1. [11-92004-E-11](#) GREGORY/CYNTHIA SHINKWIN MOTION FOR COMPENSATION FOR
DCJ-2 David C. Johnston DAVID C. JOHNSTON, DEBTORS'
ATTORNEY(S), FEES: \$15,000.00,
EXPENSES: \$0.00
9-5-13 [[202](#)]

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors', creditors holding the 20 largest unsecured claims, all creditors, parties requesting special notice, and Office of the United States Trustee on September 5, 2013. By the court's calculation, 21 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Final Application for Fees. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

FEES REQUESTED

David C. Johnson of Johnson & Johnson Law Corp., Counsel for the Debtors, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period June 3, 2011 through August 30, 2013. The order of the court approving employment of counsel was entered on August 11, 2011.

Description of Services for Which Fees Are Requested

September 26, 2013 at 10:30 a.m.

Financing: Counsel spent 17.4 hours in this category. Counsel advised the Debtors regarding multiple Bank of America claims with cross-collateral issues, cash collateral issues, personal vs. corporate assets, the validity of security interests in equipment and accounts receivable. Counsel conducted research regarding the foregoing issues, opposed various motions of Bank of America, and ultimately resolved all disputes with the bank, resulting in restructuring of the loans and consent of the bank to the second amended plan of reorganization.

Case Administration: Counsel spent 34.9 hours in this category. Counsel prepared all documents necessary for the Chapter 11 case, such as schedules of assets and liabilities, statement of financial affairs, and list of creditors holding 20 largest unsecured claims, advised creditors of the automatic stay, prepared and served the preliminary status report required by the Court, attended the initial debtor interview with the U.S. Trustee's accountant, attended the preliminary status conference and continued status conferences, and reviewed monthly operating reports.

Fee and Employment Applications: Counsel spent 1.2 hours in this category. Counsel prepared the necessary application and supporting documents to obtain approval for the Debtors to employ him.

Meeting of Creditors: Counsel spent 2.4 hours in this category. Counsel attended the meeting of creditors in Sacramento, only charging one-way travel.

Plan and Disclosure Statement: Counsel spent 18.7 hours in this category. Counsel reviewed all financial documents, including proofs of claim, schedules, and monthly operating reports, in order to formulate a plan of reorganization and disclosure statement. Counsel met with the Debtors to prepare projections and to discuss a feasible plan of reorganization. Counsel also prepared the original plan of reorganization and the original plan of reorganization and amended documents to resolve issues raised by the Court and creditors. Counsel properly noticed and served the hearing for approval of the disclosure statement and obtained approval of the disclosure statement. Counsel then properly noticed and served the hearing on confirmation of the plan of reorganization, solicited acceptances of the plan of reorganization, obtained sufficient acceptances for confirmation (ultimately based on a slight revision to the plan), obtained confirmation of the plan of reorganization, dictated the order confirming the plan, and prepared calculations for the Debtors as to the monthly payments required on all claims.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a) (4) (A) .

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services undertaken as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

(a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that Counsel's services rendered a successful negotiation and confirmation of a Chapter 11 plan. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$300.00/hour for counsel for 74.6 hours. Counsel states the fees total \$22,380.00 but he is reducing his compensation because of his medical condition which caused delays in the case. Counsel seeks reduced fees in the amount of \$15,000.00. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$15,000.00 are approved and authorized to be paid by the Plan Administrator from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

Counsel is allowed, and the Plan Administrator is authorized to pay, the following amounts as compensation as a professional in this case:

Attorneys' Fees	\$15,000.00
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For a total final allowance of \$15,000.00 in Attorneys' Fees in this case.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that David C. Johnson of Johnson & Johnson Law Corp. is allowed the following fees and expenses as a professional of the Estate:

David C. Johnson of Johnson & Johnson Law Corp., Counsel for the Debtors
Applicant's Fees Allowed in the amount of \$ 15,000.00.

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Plan Administrator is authorized to pay such fees from funds of the Estate as they are available.

2. [13-91405](#)-E-7 MARCUS/CATANYA JONES MOTION TO COMPEL ABANDONMENT
RJA-2 Robert J. Anaya O.S.T.
8-30-13 [[12](#)]

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1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(1).

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

Here, the seeks to abandon the Debtor's Business. Debtors state they hvae listed their business-related assets in Schedule A and B. Debtors state they have placed the value of these assets at \$50.00. The court can only find the following business property on Schedule B:

1. Computer Fax Machine

Debtor values this business property at \$50.00. Debtor claimed exemptions totaling \$50.00 against the business assets.

Since the exemptions in the business property exceeds the value of the property, and the negative financial consequences of the Estate retaining the property, the court determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

A minute order substantially in the following form shall be prepared and issued by the court:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Abandon Property filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted and that the personal identified as:

1. Computer Fax Machine

on Schedule B by the Debtors are abandoned to Marcus and Catanya Jones, the Debtors by this order, with no further act of the Trustee required.

3. **12-90712-E-7** **CLINICAL DOCUMENTATION** **MOTION FOR COMPENSATION FOR**
 SSA-2 **INDUSTRY ASSOCIATION** **GILBERT ASSOCIATES, INC.,**
 Thomas T. Hwang **ACCOUNTANT(S), FEES: \$3,500.00,**
 EXPENSES: \$0.00
 8-15-13 [[31](#)]

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on August 15, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

Final Ruling: The First and Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The First and Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Linda Geery, CPA at Gilbert Associates, Inc. ("Accountant"), Accountant for the Chapter 7 Trustee Michael D. McGranahan, makes a first and Final Request for the Allowance of Fees in this case. The period for which the fees are requested is for the period April 18, 2012 through June 25, 2013. The order of the court approving employment of counsel was entered on May 15, 2012.

Description of Services for Which Fees Are Requested

Correspondence: Accountant spent 1.66 hours in this category for total fees of \$222.40. Accountant requested additional information for From 990 and finalized Form 990.

Tax Preparation: Accountant spent 22.83 hours in this category for total fees of \$3,558.25. Accountant prepared project checklist, prepared and input for Form 990; prepared extension to file Form 990; tax-exempt return; assembled and mailed Form 990; prepared checklists for Form 990EZ; reviewed and finalized From 990EZ; assembled and mailed Form 990EZ.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(I) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

A review of the application shows that Accountant services rendered a successful completion of Form 990 for the benefit of the Estate. The estate has \$62,286.00 to be administered as of the filing of the application. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$230/hour for Accountant Linda Geery, \$130/hour for Keith Glen, \$55.00/hour for Amy Thao, \$85/hour for Andrew Pope and \$55/hour for Terry Gay. The court finds that the hourly rates reasonable and that Accountant effectively used appropriate services and rates for the services provided. The total Accountant' fees in the amount of \$3,500.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Accountant is allowed, and the Trustee is authorized to pay, the following amounts as compensation as a professional in this case:

Accountant' Fees	\$3,500.00
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For a total final allowance of \$3,500.00 in Accountant' Fees in this case.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Allowance of Fees and Expenses filed by Accountant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Gilbert Associates, Inc. is allowed the following fees and expenses as a professional of the Estate:

Gilbert Associates, Inc., Accountant for the Estate Applicant's Fees Allowed in the amount of \$ 3,500.00.

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

4. [12-90712-E-7](#) **CLINICAL DOCUMENTATION** **MOTION FOR COMPENSATION FOR**
SSA-3 **INDUSTRY ASSOCIATION** **STEVEN S. ALTMAN, TRUSTEE'S**
Thomas T. Hwang **ATTORNEY(S), FEES: \$4,750.00,**
 EXPENSES: \$148.00
 8-15-13 [[37](#)]

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors' committee or creditors holding the 20 largest unsecured claims, all creditors, parties requesting special notice, and Office of the United States Trustee on August 15, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

Final Ruling: The Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Steven Altman PC, Counsel for the Chapter 7 Trustee, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period April 23, 2012 through August 14, 2013. The order of the court approving employment of counsel was entered on May 7, 2012.

Description of Services for Which Fees Are Requested

Asset Analysis & Recovery: Counsel spent 3.6 hours in this category for total fees of \$900.00. Counsel assisted Trustee in the recovery of \$23,144.70 for turnover to estate from debtor's account at Merrill Lynch working case management account; sent multiple letters directed to Merrill Lynch and staff and multiple phone calls; funds successfully turned over to the Trustee.

Case Administration: Counsel spent 3.6 hours in this category for total fees of \$900.00. Counsel communicated with Trustee, interested parties in Debtor's case and third parties, including Merrill Lynch concerning turnover

of monies and estate administration matters, including preparation of appointment application and fee application.

Claims Administration: Counsel spent 0.5 hours in this category for total fees of \$125.00. Counsel reviewed prospective claims requesting administrative consideration tendered by Carrigan and response to same.

Fee/Employment Applications: Counsel spent 11.3 hours in this category for total fees of \$2,825.00. Counsel prepared firm's fee application, prepared firm's first and final fee application and CPA's first and final fee application.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services undertaken as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

(a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that Counsel's services rendered a successful turnover of monies to the trustee for the benefit of the Estate. The estate has \$62,286.00 to be administered as of the filing of the application. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$250.00/hour for counsel for 19.0 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$4,750.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$148 for copies and postage. The total costs in the amount of \$148 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel is allowed, and the Trustee is authorized to pay, the following amounts as compensation as a professional in this case:

Attorneys' Fees	\$4,750.00
Costs and Expenses	\$ 148.00

For a total final allowance of \$4,898.00 in Attorneys' Fees and Costs in this case.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Steven Altman PC is allowed the following fees and expenses as a professional of the Estate:

Steven Altman PC, Counsel for the Estate
Applicant's Fees Allowed in the amount of \$ 4,750.00
Applicants Expenses Allowed in the amount of \$ 148.00.

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

5. [12-92221](#)-E-7 ROBERT BUCHLER
SLF-5 Pro Se

MOTION TO SELL
8-29-13 [[54](#)]

DISCHARGED 11-26-12

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and Office of the United States Trustee on August 29, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(2). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to grant the Motion to Sell Property. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Chapter 7 Trustee moves for authorization to sell the estate's nonexempt interest in 13 of the Debtor's accounts receivable from past clients to the Debtor for \$5,000. Debtor is an attorney and represents that the receivables are past due amounts his clients owe him for legal services he rendered before filing bankruptcy. Debtor disclosed the receivables, collectively vaulting them at \$54,505.00. The Trustee states the sale is in the best interests of the estate.

The Debtor scheduled the accounts that comprise the receivables as follows:

- (i) "Adriana Ortiz 2011," which the Debtor valued at \$1959.00;
- (ii) "April Kroeze 2011," which the Debtor valued at \$244.00;
- (iii) "Consuelo Madrigal 2010," which the Debtor valued at \$6204.00;
- (iv) "Gabriel Lopez 2012," which the Debtor valued at \$190.00;
- (v) "George Flood 2008," which the Debtor valued at \$1433.00;
- (vi) "Henry L. Alonzo- 2006 Judgment for Attorney Fees," which the Debtor valued at \$571.00;
- (vii) "James Phosy- 2011 , "which the Debtor valued at \$88.00;

(viii) "Joel Cavazos 2011 , "which the Debtor valued at \$25.00;

(ix) "Linda Dunseth 2008," which the Debtor valued at \$1996.00;

(x) "Marsha Lawrence 2006 secured by Family Law Attorney Real Property Lien Stanislaus County Recorder DOC #2006-0097953-00," which the Debtor valued at \$9901.00;

(xi) "Olivia Albor 2003 \$10,000 secured by Family Law Attorney Real Property Lien DOC #2004-002703[,] \$10,000 secured by Family Law Attorney Real Property Lien DOC #2003-286134[,] \$10,000 secured by Family Law Attorney Real Property Lien DOC #2003-0211608," which the Debtor valued at \$31,324.00;

(xii) "Ricky Heether 2009," which the Debtor valued at \$60.00; and

(xiii) "Thomas Lopes 2011," which the Debtor valued at \$510.00.

The Trustee wishes to liquidate the estate's nonexempt interest in the receivables and obtain the maximum value for the estate. Trustee states that Debtor represented that a number of the receivables are old and the statute of limitations on many of the accounts may have run. The Trustee states that the statute of limitations appears to have run for four of the accounts: Consuelo Madrigal, George Flood, Marsha Lawrence, and Olivia Albor for a total value of \$48,862.00.

DISCUSSION

The Bankruptcy Code permits the Trustee to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b).

Here, the Trustee proposes to sell the nonexempt value of the above mentioned receivables for \$5,000 to the Debtor. The terms are set forth in the Purchase Agreement, filed as Exhibit B in support of the Motion. Dckt. 58.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The Motion to Sell Property is granted, subject to the court considering any additional offers from other potential purchasers at the time set for the hearing for the sale of the property.

A minute order substantially in the following form shall be prepared and issued by the court:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to sell property filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Trustee's proposed sale of the estate's nonexempt interest in the receivables, described as:

(i) "Adriana Ortiz 2011," which the Debtor valued at \$1959.00;

(ii) "April Kroeze 2011," which the Debtor valued at \$244.00;

(iii) "Consuelo Madrigal 2010," which the Debtor valued at \$6204.00;

(iv) "Gabriel Lopez 2012," which the Debtor valued at \$190.00;

(v) "George Flood 2008," which the Debtor valued at \$1433.00;

(vi) "Henry L. Alonzo- 2006 Judgment for Attorney Fees," which the Debtor valued at \$571.00;

(vii) "James Phosy- 2011 ,"which the Debtor valued at \$88.00;

(viii) "Joel Cavazos 2011 ,"which the Debtor valued at \$25.00;

(ix) "Linda Dunseth 2008," which the Debtor valued at \$1996.00;

(x) "Marsha Lawrence 2006 secured by Family Law Attorney Real Property Lien Stanislaus County Recorder DOC #2006-0097953-00," which the Debtor valued at \$9901.00;

(xi) "Olivia Albor 2003 \$10,000 secured by Family Law Attorney Real Property Lien DOC #2004-002703[,] \$10,000 secured by Family Law Attorney Real Property Lien DOC #2003-286134[,] \$10,000 secured by Family Law Attorney Real Property Lien DOC #2003-0211608," which the Debtor valued at \$31,324.00;

(xii) "Ricky Heether 2009," which the Debtor valued at \$60.00; and
(xiii) "Thomas Lopes 2011," which the Debtor valued at \$510.00,

to Robert L. Buchler, Debtor, for \$5,000.00, pursuant to the terms set forth in the Purchase Agreement, filed as Exhibit B in support of the Motion, Dckt. 58, is granted.

6. [11-94224](#)-E-11 EDWARD/ROSIE ESMAILI CONTINUED MOTION TO VALUE
DCJ-7 David C. Johnston COLLATERAL OF WELLS FARGO BANK,
N.A.
7-3-13 [[283](#)]

CONT. FROM 7-18-13

Local Rule 9014-1(f)(2) Motion - Continued Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on respondent creditor, and Office of the United States Trustee on July 3, 2013. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The court having entered an order valuing the property on September 18, 2013, Dckt. 358, **the Motion to Value Collateral is removed from the calendar.**

7. [11-94224](#)-E-11 EDWARD/ROSIE ESMAILI CONTINUED MOTION TO VALUE
DCJ-8 David C. Johnston COLLATERAL OF WELLS FARGO BANK,
N.A.
7-3-13 [[287](#)]

CONT. FROM 7-18-13

Local Rule 9014-1(f)(2) Motion - Continued Hearing.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on respondent creditor, and Office of the United States Trustee on July 3, 2013. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The court having entered an order valuing the property on September 18, 2013, Dckt. 357, **the Motion to Value Collateral is removed from the calendar.**

8. [13-90332](#)-E-7 DANIEL SIEGEL
Brian S. Haddix

MOTION TO AMEND INSTALLMENT
PAYMENT SCHEDULE AND LEAVE TO
FILE LATE CERTIFICATE OF DEBTOR
EDUCATION
9-6-13 [[35](#)]

Notice Provided: The Court issued an Order Setting Hearing, which was served by the Clerk of the Court through the Bankruptcy Noticing Center on Debtor, Attorney for Debtor, Chapter 7 Trustee, and Office of the U.S. Trustee on September 11, 2013. 15 days notice of the hearing was provided.

No Tentative.

On September 6, 2013, Debtor filed a handwritten motion to the court, stating that she trusted her lawyer, Brian Haddix, to take care of the certificate of debtors education. Debtor states he received the copy on July 25th and assumed it was sent. Debtor states he has had serious health issues. Debtor states he was contacted by his attorney's paralegal the last day when he was supposed to complete paperwork and he completed it as soon as he was able. Debtor states he has hired a new lawyer (although no substitution appears on the docket to date). Debtor requests a payment plan for the fees due.

The court notes the Financial Management Certificate was filed September 6, 2013.

9. [11-92235](#)-E-11 JAMES/LORI SARAS
MRL-137 Mikalah R.Liviakis

MOTION TO SELL
9-6-13 [[746](#)]

Local Rule 9014-1(f)(2) Motion.

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, creditors holding the 20 largest unsecured claims, all creditors, parties requesting special notice, and Office of the United States Trustee on September 6, 2013. By the court's calculation, 20 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The Motion to Sell Property has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion to Sell Property. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

James and Lori Saras, the Plan Administrators, move the court to authorize the sale of 44 acres of land located at 1969 Costner Road, Modesto, California, to Grover Family Properties, L.P. for \$975,000.00.

However, Plan Administrators not provided sufficient notice pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(2). Here, 21 days' notice is required and by the court's calculation, only 20 days' notice was provided to the parties.

If the court waives the one day notice defect, the court will make the following findings of fact and conclusions of law:

The Bankruptcy Code permits the fiduciary of the estate to sell property of the estate after a noticed hearing. 11 U.S.C. § 363(b). Under the confirmed Plan, James and Lori Saras, the Plan Administrators, are such fiduciary and are to obtain bankruptcy court approval under § 363.

Here, the terms of the proposed sale of real property to Grover Family Properties, L.P. for \$975,000.00 are set forth in the Purchase Agreement, filed as Exhibit A in support of the Motion. Dckt.

749. Debtors-in-Possession argue that the price is fair, averaging \$22,000.00 an acre, which is \$2,000 more an acre than projected in their confirmed plan. Dckt. 665.

The Plan Administrators argue that they own the property free and clear of any liens. They state that a six percent (6%), which they compute to be \$102,000.00 will be paid to PMZ Commercial, the realtor for the Plan Administrators. However, 6% of \$975,000.00 is only \$58,500.00.

\$50,000.00 of the sales proceeds will be held back for capital gains taxes and \$30,000.00 in miscellaneous closing costs. Debtors-in-Possession state the remainder will be allocated as follows:

1. \$198,000 to the Internal Revenue Service
2. \$2,877.25 to the Franchise Tax Board
3. \$58,309.90 to the Employment Development Department
4. \$2,000.00 to JPMorgan Chase Bank, N.A.
5. \$40,000.00 to the Ranching Crew workers
6. \$85,000.00 to Nora Torres Farm Services, Inc.
7. \$53,577 for attorneys fees for David Sternberg and Mikalah Liviakis
8. \$186,000.00 to the general unsecured creditors
9. Debtors will retain any remaining funds.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate. The Motion to Permit Debtor to Sell Property is granted, subject to the court considering any additional offers from other potential purchasers at the time set for the hearing for the sale of the property.

ISSUANCE OF A COURT DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to sell property filed by the Plan Administrators having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that James and Lori Saras, the Plan Administrators under the Confirmed Chapter 11 Plan in this case, are authorized to sell to Grover Family Properties, L.P. or nominee ("Buyer"), the real property commonly known as 44 acres of land located at 1969 Costner Road, Modesto, California ("Real Property"), on the following terms:

1. The Real Property shall be sold to Buyer for \$975,000.00, on the terms and conditions set forth in the Purchase Agreement, filed as Exhibit A in support of the Motion. Dckt. 749.
2. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses incurred in order to effectuate the sale.
3. The Plan Administrators be, and hereby is, authorized to execute any and all documents reasonably necessary to effectuate the sale.
4. The Plan Administrators be and hereby are authorized to pay a real estate broker's commission in an amount no more than six percent (6%) of the actual purchase price upon consummation of the sale. The six percent (6%) commission shall be paid to the Trustee's broker PMZ Commercial.

IT IS ORDERED that the provisions of Federal Rule of Bankruptcy Procedure 6004(h) are waived.

10.	<u>12-90836-E-7</u>	PATRICIA DAY Pablo A. Tagre	OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS 8-23-13 [33]
	HSM-2		

DISCHARGED 7-2-12

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on August 23, 2013. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

Final Ruling: The Objection to Debtor's Claim of Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The hearing on the Objection to Debtor's Claim of Exemptions is continued to 10:30 a.m. on October 31, 2013. No appearance at the September 26, 2013 hearing is required.

Chapter 7 Trustee objects to Debtor's amended Claim of Exemptions filed on July 26, 2013 by the Debtor. Trustee states this case was closed on July 6, 2012, and then reopened on May 7, 2013, based upon the discovery of a real

property asset in Canada not previously disclosed. This is the same property that the Debtor is now claiming as exempt. The Debtor claimed as exempt her interest in real property located at Lot 14; Block 1; Plan 8421296 in Pine Grove Estates, Athabasca County, Alberta, Canada ("Property"), valuing the property at \$420,000.00 and claiming \$175,000.00 exempt pursuant to Cal. Code Civ. P. § 704.730. The Debtor states she resides in the property, she is over 55 and her income is less than \$15,000.00.

Trustee argues that the homestead exemption should be denied due to the Debtor's bad faith filing conduct and prejudice caused to the Trustee, the Estate and the creditors.

Debtor failed to respond to the Trustee's Objection. However, at the status conference held on September 5, 2013, debtor's counsel advised the court that he is withdrawing from the case and Debtor asserted that she was looking for new counsel. The court continued the status conference to October 31, 2013 and ordered that an answer be filed not later than October 7, 2013.

The Trustee filed a statement stating that he would not oppose a 30 day continuance if the court so orders.

Based on the fact that Debtor is currently without counsel and is seeking a new attorney, the court will continue the hearing to October 30, 2013, with Debtor providing a response on or before October 7, 2013. If Debtor fails to file a written response by October 7, 2013, the court may enter the default of Debtor and resolve the matter without oral argument.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to Debtor's Claim of Exemptions filed by Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Objection is continued to 10:30 a.m. on October 31, 2013.

IT IS FURTHER ORDERED that the Debtor shall file and serve an opposition, if any, to the Objection to Claim of Exemption on or before October 24, 2013.

11. [12-91442-E-11](#) ALEXANDRINO/DURVALINA MOTION FOR COMPENSATION FOR
TOG-15 VASCONCELOS THOMAS O. GILLIS, DEBTORS'
Thomas O. Gillis ATTORNEY(S), FEES: \$29,112.50,
EXPENSES: \$68.32
8-27-13 [[164](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors', Debtor's Attorney, all creditors, parties requesting special notice, and Office of the United States Trustee on August 27, 2013. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Interim Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to grant the Interim Application for Fees.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

FEES REQUESTED

Thomas O. Gillis, Counsel for the Debtors-in-Possession, makes an Interim Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period May 18, 2012 through August 26, 2013. The order of the court approving employment of counsel was entered on June 3, 2012.

Description of Services for Which Fees Are Requested

Case Administration: Counsel spent 38.50 hours in this category. Counsel prepared all documents necessary for the Chapter 11 case, such as schedules of assets and liabilities, statement of financial affairs; prepared and served status reports and attended hearings, and advised debtors of their responsibilities under Chapter 11.

Valuation Motions, Responses, Objections: Counsel spent 11.40 hours in this category. Counsel prepared and filed two Motions to Value the Collateral of the clients' rental properties. Counsel consulted with clients regarding treatment of properties, negotiated stipulations and prepared correspondence and emails to creditors, as well as attended hearings.

Other Motions, Responses, Objections: Counsel spent 1.90 hours in this category. Counsel prepared and filed a Motion and Order to Shorten time.

Meeting of Creditors: Counsel spent 21.40 hours in this category. Counsel prepared and consulted with clients and attended the IDI hearing and 341 hearings. Hours include travel time with client from Modesto. Counsel took a Portuguese interpreter with him to the IDI and 341 meetings.

Fee/Employment Applications and Objections: Counsel spent 6.60 hours in this category. Counsel prepared and filed the application seeking authority for my employment and all supporting documents, including the order authorizing employment. Counsel prepared and filed the Application for Attorney Fees and Expenses.

Plan and Disclosure Statement: Counsel spent 16.10 hours in this category. Counsel prepared and filed a Chapter 11 Plan and Disclosure Statement and prepared and circulated the Ballots and Order approving the plan.

Financing: Counsel spent 22.70 hours in this category. Counsel met with the client and prepared and filed the monthly reports on their behalf.

U.S. TRUSTEE'S OPPOSITION

The acting United States Trustee ("UST") filed a limited objection to the fee application, arguing that counsel's request for \$29,112.50 for his services in this relatively straight-forward case is too early, as the plan has not yet been confirmed.

The Trustee also states specific objections to the fees requested for (1) preparing monthly operating reports; (2) preparing status reports; (3) accompanying the Debtor to the bank to open DIP accounts; and (4) paralegal support. The Trustee argues these fees are excessive, duplicative or otherwise objectionable. Based on these objections the Trustee argues that Counsel's fees should be \$23,237.00.

Specifically, the Trustee states that he is concerned about the size of this request because the case does not appear to be particularly complex, counsel estimated his fees through confirmation would only be \$20,000.00, and this is only an interim fee application.

Trustee also argues that the requested fees for preparing and filing monthly operating reports are excessive and duplicative.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

- (A) the time spent on such services;
- (B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

- (i) unnecessary duplication of services; or
- (ii) services that were not--
 - (I) reasonably likely to benefit the debtor's estate;
 - (II) necessary to the administration of the case.

11 U.S.C. § 330(a) (4) (A) .

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services undertaken as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

- (a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?
- (b) To what extent will the estate suffer if the services are not rendered?
- (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

Counsel states his services rendered saved the Debtors rentals from foreclosure and gave them an opportunity to establish stable renters and reorganize for the benefit of the Estate. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

However, the Trustee raises several valid points. The court typically only allows a percentage of the attorney fees in a interim application for compensation in a Chapter 11 case, especially if the case has not been finalized and tasks remain for counsel to complete such as confirmation of the plan.

Secondly, the court agrees that \$4,857.00 (8.3 hours of counsel time and 14.4 hours of paralegal time) is excessive for 14 monthly operating reports and eight amended reports. The court notes that it does not typically allow counsel to charge its \$325/hour attorney rate for services that do not require the services of an attorney but rather services of a bookkeeper or accountant. The UST's suggestion of .3 hours of time to review the reports is sufficient, amounting to 6.9 hours at \$325/hour is \$2,242.50 (a reduction of \$2,615.00).

Additionally, the court agrees that \$1,445 for preparing and filing five status reports that are substantially similar is not reasonable. The court reduces the status report fees to \$945.00 (a reduction of \$500.00).

Lastly, the court agrees that the fees for both counsel and a paralegal to assist the Debtors-in-Possession to set up DIP accounts is excessive and duplicative. Counsel charged \$552.50 (1.7 hours) for his time in addition to \$255.00 for paralegal's time. The court reduces these fees by \$255.00 for the duplicative time charged by counsel.

The hourly rates for the fees billed in this case are \$325.00/hour for counsel and \$150.00/hour for a paralegal. While the Trustee argues that the paralegal rate of \$150.00 is unsupported, the court notes that this rate is not unreasonable in this District. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$25,445.50 (\$29,112.50 less \$2,615.00 for monthly operating reports, \$500.00 for status report fees, and \$255.00 for DIP account fees) are approved.

The court commonly authorizes the payment of 70% of the fees on an interim basis, which amount is \$18,019.75, from the available funds of the Estate as permitted by any stipulation or order authorizing the use of cash collateral or from unencumbered funds in a manner consistent with the order of distribution in this Chapter 11 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$68.32 for postage. The total costs in the amount of \$68.32 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 11 case.

Counsel is allowed, and the Trustee is authorized to pay, the following amounts as compensation as a professional in this case:

Attorneys' Fees	\$25,742.50
Costs and Expenses	\$ 68.32

For a total interim allowance of \$25,810.82 in Attorneys' Fees and Costs in this case.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Thomas O. Gillis is allowed the following fees and expenses as a professional of the Estate:

Thomas O. Gillis, Counsel for the Estate
Applicant's Fees Allowed in the amount of \$ 25,742.50
Applicants Expenses Allowed in the amount of \$ 68.32,

IT IS FURTHER ORDERED that the Application is denied as to \$3,370.00 in fees, with prejudice.

IT IS FURTHER ORDERED that this is a interim allowance of fees and the debtor in possession is authorized to pay \$18,019.75 of the allowed fees and \$68.32 of the allowed expenses, after application of any retainer held by counsel for fees and costs in this case, and then from funds of the Estate as permitted by a cash collateral stipulation or order, or from unencumbered monies of the estate as they are able to be paid in the ordinary course of business and from such funds that are unencumbered or are cash collateral authorized to be used pursuant to a cash collateral stipulation or order.

12. [12-93049](#)-E-11 MARK/ANGELA GARCIA
UST-1 Mark J. Hannon

MOTION TO DISMISS CASE AND/OR
MOTION TO CONVERT CASE FROM
CHAPTER 11 TO CHAPTER 7
8-8-13 [[198](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors', Debtor's Attorney, and Office of the United States Trustee on August 8, 2013. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

No Tentative Ruling: The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's tentative decision is to xxxx the Motion to Dismiss and dismiss the case. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Acting United States Trustee ("UST") moves for an order dismissing or converting the case for two reasons. First, there is a continuing loss to or diminution of the Debtors' estate and the absence of a reasonable likelihood of rehabilitation pursuant to 11 U.S.C. § 1112(b)(1) and (b)(4)(A). Trustee argues that Debtors have suffered cash losses of \$9,020.68 during the case according to the monthly operating report and amended schedules. The Trustee also states the Debtor's proposed plan calls for payment of more than \$2,958.91 to account just for the priority tax and general secured claims which suggests they cannot perform these payments.

Second, the Trustee states that the Debtors' operating reports are incomplete and internally inconsistent pursuant to 11 U.S.C. § 1112(b)(4)(F). Trustee argues each report is a confusing patchwork of two different forms: the Small Business Monthly Operating Report and the Small Real Estate/Individual Case form. Trustee also argues that the information in the bank account statements attached to the reports for April, May and June does not match the receipts and disbursements filed elsewhere in the reports.

DEBTOR'S OPPOSITION

Debtor filed a response on September 7, 2013, stating that two of the monthly operating reports were filed late but that the delay was not severe. Debtor also contend that the debtors estate has not depleted since the filing,

but that the gross revenue has increased by 18% for 2013 over that received in 2012. This argument ignores the net cash flow impact to the estate.

Debtor's Counsel and Debtor also filed Declarations regarding the LSC Realty California, LLC and their interactions with Mr. MacDonald. Counsel states that Mr. MacDonald's declaration is false and all of his statements and declarations should be disregarded because he has tried to liquidate this case.

CREDITOR IAIN MACDONALD'S SUPPORT

Creditor Iain MacDonald filed a declaration in support of the Trustee's Motion to Convert or Dismiss for several reasons. First, MacDonald states that Debtor's July 2013 MOR discloses for the first time the name of the family trust account. MacDonald states this raises issues, such as substantial cash is run through the account, the Debtor's testimony regarding the account is inconsistent, and the account is not a DIP account even though it was opened after the commencement of the case.

MacDonald also argues that at the 2004 examination of Mr. Garcia, he testified that the July 31 ending cash balance could not be reconciled with the purported net income for the period, Mr. Garcia made substantial cash expenditures which are not reflected on the MOR filed in this case and Mr. Garcia is payment an architect to design improvements to a liquor store even though Debtors are not the owners of this property.

CREDITOR YP WESTERN DIRECTORY'S OPPOSITION

Creditor YP WESTERN DIRECTOR, LLC, filed an opposition stating that conversion of the matter would not benefit the unsecured creditors as they would receive pennies on the dollar if the estate was liquidated.

CREDITOR UNITED STATES FIRE INSURANCE COMPANY'S SUPPORT

Creditor United States Fire Insurance Company filed a joinder to the UST's motion to convert or dismiss the case and requests that the case be converted to one under Chapter 7 rather than dismissed.

UST'S REPLY

The UST argues that the several disclosures in the Debtor's Opposition and Declaration of Mark Garcia, raises questions as to whether the case should be dismissed or converted pursuant to 11 U.S.C. § 1112(b)(4)(A). However, the UST states that the same disclosures raise serious questions about the Debtors' sustainability to serve as fiduciaries for the state and there is still cause to dismiss or convert under 11 U.S.C. § 1112(b)(4)(F).

The UST argues that Mr. Garcia disclosed in his declaration that he is holding \$16,501.02 in cash outside of the DIP account and \$13,000 in an account at Community Banks of Colorado ending in 3549, which they only reported in the July MOR. The UST argues that while Debtors may be able to fund the plan, the belated disclosures, the failure to explain the deposit of cash into an FDIC insured account and the failure to explain why the bank account was not on their first seven (7) MORs raise questions about the Debtors' ability to serve as fiduciaries for the estate.

The UST also states that the Debtors made three cash withdrawals from the account ending in 3549: \$6,000 on July 17; \$3,000 on July 19, and \$3,000 on July 26. UST argues that while the Debtors claim that this account is used only for credit card transactions and usually each month all credit card deposits are transferred to the account with Rabobank, there are not matching deposits into the DIP account.

The UST argues that cause still exists to dismiss or convert the case under 11 U.S.C. § 1112(b)(4)(F) because the Debtors have not timely filed complete and accurate MORs. UST states that seven (7) operating reports failed list or to attach the required statements for Community Banks of Colorado account ending in 3549.

Lastly, the UST states that he is sympathetic to the unsecured creditors not fairing well if the case is converted to one under Chapter 7 (YP Western Directory's Opposition). The UST states that the court has discretion to appoint a Chapter 11 Trustee.

DISCUSSION

Conversion or Dismissal

A Chapter 11 case may only be dismissed or converted for cause. 11 U.S.C. § 1112(b)(1). The Bankruptcy Code provides a list of causes, which are sufficient to support dismissal or conversion. *Id.* at § 1112(b)(4). Generally, such lists are viewed as illustrative rather than exhaustive; the court should "consider other factors as they arise, and use its equitable powers to reach the appropriate result in individual cases." *Pioneer Liquidating Corp. V. U.S. Trustee (In re Consol. Pioneer Mortg. Entities)*, 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000) (citation omitted).

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

[O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1). The term "cause" includes,

(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation ...

(F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter

11 U.S.C. § 1112(b) (A) & (F).

Appointment of a Chapter 11 Trustee

Upon request of a party in interest and after notice and hearing, the court must order the appointment of a trustee upon a showing of cause, including fraud, dishonesty, incompetence or gross mismanagement. 11 U.S.C. § 1104(a)(1). Section 1104(a)(1) contains a nonexclusive list of bases upon which cause may be found: fraud, dishonesty, incompetence, and gross mismanagement. Rather than focusing on misdeeds of past management, Section 1104(a)(1) focuses on the current management of the debtor. 7 Collier on Bankruptcy ¶ 1104 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). In addition, instances where a debtor has diverted funds or lied at a meeting of creditors have been found to constitute cause. *Id.* Other situations in which the court has found cause include the debtor in possession's failure to keep adequate records, failure to file reports, and a history of questionable transactions between the debtor and affiliated company. *In re Oklahoma Refining Co.*, 838 F.2d 1133, 1136 (10th Cir. Okla. 1988). In addition, underlying conflicts and self dealing may amount to cause. *In re Embrace Sys. Corp.*, 178 B.R. 112, 178 (Bankr. W.D. Mich. 1995).

Furthermore, the debtor in possession is a fiduciary for the estate and its creditors. *In re United Healthcare Sys., Inc.*, 200 F.3d 170 (3d Cir. 1999), cert. denied, 530 U.S. 1204, 120 S.Ct. 2199 (2000); *Dunes Hotel Assocs. V. Hyatt Corp.*, 245 B.R. 492 (D.S.C. 2000). As such, Debtors are required to turn square corners and avoid conduct that would prejudice the rights of those whose interests they are required to protect. *In re Woodson*, 839 F.2d 610 (9th Cir. Cal. 1988). This duty includes providing proper scheduling of interests in property, and the intentional and fraudulent omission of property from the sworn schedules will amount to an offense punishable under the Criminal Code. 3 Collier para. 521.06[3], at 521-24.

This case was filed on November 30, 2012. The Debtors in Possession now have before the court a proposed plan and disclosure statement. Dckts. 187, 188. In the Disclosure Statement the Debtor report that in 2007 the bail bonds business generated gross revenues of \$1,039,389, from which time the revenues have declined to \$513,214 in 2011 and to \$456,000 in 2012. Part of this is explained by the decline in home values, reducing the collateral which can be provided to secure a bail bond.

The court has reviewed the Monthly Operating Reports filed by the Debtors in Possession.

Month Date Filed	Receipts (Disbursements)	Bank Accounts, Starting Balance Deposits Withdrawals Ending Balance

September 26, 2013 at 10:30 a.m.

- Page 31 of 79 -

12/2012 Filed 1/30/13	\$23,313 (\$22,435)	9855: \$ 1,397 +\$16,230 (\$15,238) \$ 2,389 3709: \$32.62 +\$ 0.00 (\$ 0.00) \$32.64
01/2013 Filed 02/13/13	\$23,580 (\$23,580)	9855: \$ 2,389 +\$13,225 (\$18,063) (\$ 2,448)
02/2013 Filed 03/13/13	\$15,552 (\$17,263)	9855: (\$ 2,448) +\$ 7,750 (\$ 5,301) \$ 0.00 8060: \$ 5,831 +\$ 9,817 (\$11,384) \$ 4,464
03/2013 Filed 04/16/13	\$53,208 (\$41,609)	8060: \$ 4,264 +\$31,219 (\$23,885) \$11,599
04/2013 Filed 5/14/13	\$25,660 (\$33,447)	8060: \$11,599 +\$13,348 (\$23,336) \$ 1,720 3836: \$ 2,080 +\$ 0.00 (\$ 0.00) \$ 2,080

05/2013 Filed 07/1/13	\$39,068 (\$36,112)	8060: \$ 1,720 +\$11,737 (\$13,010) \$ 447 5523: (\$ 4) +\$ 0.00 (\$ 12) (\$ 16)
06/2013 Filed: 07/29/13	\$37,800 (\$33,617)	8060: \$ 447 +\$16,905 (\$15,778) \$ 1,574
07/2013 Filed 08/15/13	\$65,986 (\$40,816)	8060: \$ 1,574 +\$29,822 (\$30,076) \$ 1,320 3836: \$2,081 +\$ 0.00 (\$ 0.00) \$2,081 3549: \$ 1,073 +\$25,949 (\$13,947) \$13,074
08/2013 Filed: 09/13/13	\$35,730 (\$35,816)	8060: \$ 1,320 +\$40,036 (\$29,209) \$12,146 3549: \$13,074 +\$11,904 (\$18,407) \$ 6,571

In the Debtor's Declaration, he states that the two Debtors own commercial property consisting of three offices, two of which are rented and one which is the bail bond business. Dckt. 239. The August 2013 Monthly Operating Report discloses the Debtors in Possession receiving \$500.00 in rent for that month and \$4,500.00 in cumulative rent since the commencement of the case (nine months). For the August or July 2013 monthly operating reports there is not a detail of the expenses provided. The June 2013 report provides detail for that month and the year to date.

In considering this type of case, the court starts with the proposition that the Debtors in Possession are the fiduciaries of the estate in the place of a trustee. 11 U.S.C. § 1107. The U.S. Trustee and creditors are correct in asserting that the Monthly Operating Reports filed in this case are so inconsistent and inadequate that they expose the inability of the Debtors in Possession to fulfill their fiduciary duties. The court in independently reviewing the Monthly Operating Reports is struck by inconsistencies between the reported income, reported expenses, and bank account balances.

First, bank accounts appear and then disappear. Second, substantial amounts of monies each month are not tracked through the bank accounts of the estate. Examples include,

August 2013: The Debtors in Possession Report having received \$35,730.00 in income. Bank deposits for \$51,940 are shown on the Monthly Operating Report. An "extra" \$16,000.00 appears in the estate's bank accounts

For disbursements, the Debtor in Possession report (\$35,816). However, the bank statements disclose (\$47,616.00) in disbursements from the estate bank accounts.

July 2013: The Debtors in Possession report having received \$65,986 in income. Bank deposits of \$55,769 are disclosed on the bank statements.

For disbursements, the Debtors in Possession report (\$40,816). However, the bank statements disclose (\$44,023) in disbursements from the estate bank accounts.

June 2013: The Debtors in Possession report having received \$37,800 in income. Bank deposits of \$16,905 are disclosed on the bank statements.

For disbursements, the Debtors in Possession report (\$33,617). However, the bank statements disclose (\$15,778) in disbursements from the estate bank accounts.

Cause has been shown warranting relief under 11 U.S.C. § 1112. The financial reporting and handling of estate assets by the Debtors in Possession demonstrate a continuing loss to the estate, gross mismanagement of the estate, and failure to fill clear and accurate monthly operating reports. If a Chapter 11 Trustee was generating monthly operating reports in the manner of the Debtors in Possession, the U.S. Trustee would be moving to remove the trustee and discharge him or her from further service. The debtors in such a case would be pursuing the trustee.

The issue before the court whether conversion, dismissal, or the appointment of a Chapter 11 Trustee is proper.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Convert or Dismiss the Chapter 11 case filed by the U.S. Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Convert or Dismiss is
xxxx.

13. [12-93249-E-7](#) ROBERT HORNAUER MOTION FOR SUMMARY JUDGMENT
[13-9014](#) CCR-1 Gary F. Zilaff 8-28-13 [[17](#)]
SERRATO ET AL V. HORNAUER

Local Rule 9014-1(f) (1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney on August 8, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion for Summary Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (1).

The court's tentative decision is to grant the Motion for Summary Judgment. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

INTRODUCTION

Plaintiffs, Caroline Serrator and Cheryl Bower (hereinafter "buyers"), seek recovery against Defendant Robert Hornauer (hereinafter "seller") for a nondischargeable debt under 11 U.S.C. § 523(a) (2) (A) based upon a state court judgment for fraud under California Civil Code § 3343 entered against Defendant.

Buyers argue that the arbitrator found that the seller had a duty under California law to disclose the presence of underground storage tanks, and a scheduled highway construction project to the buyers regarding the buyers' purchase of real property. The arbitrator awarded the buyers damages in the amount of \$115,000, among other awards, pursuant to California Civil Code § 3343 (fraud in purchase, sale or exchange of property).

The buyers submitted a Motion for Summary Judgment claiming that collateral estoppel should apply to the findings of the Arbitrator as set forth in the accompanying Statement of Undisputed Facts in Support of Plaintiffs' Motion for Summary Judgment.

FACTS

1. A Judgment Upon Confirmation of Arbitration Award was filed on April 23, 2009 in the Superior Court, State of California, County of San Mateo, Case No. CIV 469444 entitled Caroline Serrato and Cheryl Bower, Plaintiffs and Petitioners, v. Robert Hornauer and Elizabeth Te Selle, Defendants and Respondents. (Hereinafter denoted as "Judgment")
2. The Judgment was final.
3. The Judgment confirms the award of the arbitrator dated January 25, 2009 and the award as amended dated March 11, 2009, which are attached as Exhibits A and B, respectively to the Judgment.
4. Judgment was entered in favor of Caroline Serrato and Cheryl Bower and against Robert Hornauer ("Hornauer") and Elizabeth Te Selle ("Te Selle") in the total amount of \$185,813.28.
5. The total Judgment amount is composed of the following: Principal amount of damage award is \$115,000; Attorneys fees are \$55,000; Costs are \$11,438.80; and Interest on the award is in the amount of \$4,374.48.
6. The award for damages in the amount of \$115,000 is pursuant to California Civil Code §3343 (i.e., Fraud in the purchase, sale or exchange of property; additional damages).
7. Serrato and Bower purchased the real Property located 8 Peninsula Avenue, Burlingame, California (the "Property") in August 2004 for \$700,000 from Hornauer and Te Selle.
8. Hornauer and Te Selle had an obligation under California law to disclose to Serrato and Bower the presence of pipes on the Property indicating the presence of underground storage tanks.
9. Hornauer had the background, training and experience concerning building and utility supply and operation systems to know that the presence of the pipes suggested the possible presence of underground storage tanks.
10. Hornauer took steps to conceal the presence of the pipes by the strategic placement a shoe box, garbage and landscaping bark.
11. Hornauer's acts of concealment constitute strong circumstantial evidence that he believed that further investigation by a prospective buyer would uncover a condition materially affecting the value or desirability of the Property.
12. Under these circumstances, the Arbitrator found that Hornauer's failure to disclose the presence of the pipes violated the sellers' duty of disclosure and constituted fraud.
13. Hornauer and Te Selle had an obligation under California law to disclose to Serrato and Bower a planned freeway construction project known as the 101 Auxiliary Lane Project.

14. The Arbitrator found that Hornauer wrongfully failed to disclose the existence of the 101 Auxiliary Lane Project in completing the required property disclosure transfer statement.

15. Serrato and Bower did not discover the existence of the pipes, the underground storage tanks and the construction project until after close of escrow.

16. The Arbitrator found that the fair market value of the Property at the close of escrow was \$585,000 and awarded Serrato and Bower the \$115,000 difference between the actual value of what they paid for the Property and the actual value of what they received as damages pursuant to California Civil Code Section 3343.

17. Serrato and Bower were the prevailing parties in the Arbitration because they were the party with the net monetary recovery under California Code of Civil Procedure §1032(a)(4).

OPPOSITION

The seller submitted a opposition to the buyers' Motion for Summary Judgment arguing that the buyers are not entitled to summary judgment with respect to the nondischargeability of the debt in question. The seller contends that collateral estoppel cannot apply in the instant action, because the arbitration award fails to show that all the elements of actual fraud were actually litigated and adjudicated in that prior proceeding. Therefore, the seller argues that the buyers have not met their burden of proof, and are consequently not entitled to judgment on their first claim for relief.

SUMMARY JUDGMENT STANDARD

In an adversary proceeding, summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Bankr. P. 7056. The key inquiry in a motion for summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), *incorporated by* Fed. R. Bankr. P. 7056; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); 11 James Wm. Moore et al., *Moore's Federal Practice* § 56.11[1][b] (3d ed. 2000) ("Moore").

"[A dispute] is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute [over a fact] is 'material' only if it could affect the outcome of the suit under the governing law." *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 707 (9th Cir. 2008) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory

answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), incorporated by Fed. R. Bankr. P. 7056.

In response to a properly submitted motion for summary judgment, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute for trial. *Barboza*, 545 F.3d at 707 (citing *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055-56 (9th Cir. 2002)). The nonmoving party cannot rely on allegations or denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery materials, to show that a dispute exists. *Id.* (citing *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In ruling on a summary judgment motion, the court must view all of the evidence in the light most favorable to the nonmoving party. *Barboza*, 545 F.3d at 707 (citing *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001)). The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978). "[A]t the summary judgment stage[,] the judge's function is not himself to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

COLLATERAL ESTOPPEL APPLICATION STANDARD

The United States Supreme Court has recognized that collateral estoppel applies in dischargeability proceedings. *Grogan v. Garner*, 498 U.S. 279, 284-85 (1991).

In describing the five elements for Collateral Estoppel under California law, the Ninth Circuit Court of Appeals stated,

Under California law, collateral estoppel only applies if certain threshold requirements are met:

First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. *Harmon v. Kobrin* (In re *Harmon*), 250 F.3d 1240, 1245 (9th Cir. 2001).

Cal-Micro, Inc. v. Cantrell, 329 F.3d 1119, 1123 (9th Cir. 2003). The party asserting collateral estoppel bears the burden of establishing these requirements. *In re Harmon*, 250 F.3d 1240, 1245 (9th Cir. 2001)

The party "asserting collateral estoppel carries the burden of proving a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action." *In re Lambert*, 233 Fed. Appx. 598, 599

(9th Cir. 2007). If the Court has a reasonable doubt as to what was actually decided by the prior judgment, it will refuse to apply preclusive effect. *Id.*

DISCUSSION

The Bankruptcy Code provides that any debt for money, property, services, or an extension, renewal, or refinancing of credit, obtained by actual fraud are nondischargeable. 11 U.S.C. § 523(a)(2)(A).

Ninth Circuit case law has confirmed that the elements of fraud under California law are identical to the elements under § 523(a)(2)(A). *Younie v. Gonya*, 211 B.R. 367, 373-74 (9th Cir. BAP 1997) ("The elements of § 523(a)(2)(A) mirrors the elements of common law fraud and match those for actual fraud under California law.").

To establish actual fraud supporting nondischargeability of a debt, the moving party has to prove: (1) misrepresentation, fraudulent omission (non-disclosure) or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct. *In re Harmon*, 250 F.3d 1240, 1246 (9th Cir. 2001), citing *Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman)*, 234 F.3d 1081, 1085 (9th Cir. 2000).

Movant has provided the court with a certified copy of the Judgment Upon Confirmation of Arbitration Award ("Judgment"). The Judgment states,

In conclusion, although Respondents may not have an obligation to conduct a complete investigation to determine the significance of the pipes, they cannot actively seek to conceal the pipes by artifice or deception and deny a buyer the opportunity to investigate further in their exercise of due diligence. Under these circumstances, the Arbitrator finds by a preponderance of evidence that Respondents' failure to disclose the presence of the pipes violates the seller's duty of disclosure and **constitutes fraud.**

Judgment, Exhibit 1, 6:22-27 (emphasis added). Additionally, the Arbitrator found that,

the fair market value of the property at the close of escrow was \$585,000 and awards Claimants the \$115,000 difference between the actual value of what they paid for the property and the actual value of what they received as **damages pursuant to Civil Code Section 3343.**

Id. at 11:13-16 (emphasis added).

Here, the Arbitrator's decision explicitly stated that the damages awarded were based on California Civil Code § 3343, a statute that addresses damages awarded in fraud actions arising out of property transactions between sellers and buyers.

California Civil Code § 3343 provides (emphasis added):

§ 3343. **Fraudulent** property sales

(a) **One defrauded** in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction, including any of the following:

(1) Amounts actually and reasonably expended in reliance upon the fraud.

(2) An amount which would compensate **the defrauded party** for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud.

To grant the damages pursuant to California Civil Code § 3343, the arbitration determination and state court judgment first had to determine that the Plaintiffs were "defrauded." The statutory basis for fraud is California Civil Code § 1709, which provides, "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." The elements of fraud under California law "[w]hich must be pleaded and proved if a plaintiff is to prevail, consist of a false representation of a material fact, made with knowledge of its falsity and with the intent to induce reliance thereon, upon which plaintiff justifiably relies to his injury." (*Wishnick v. Frye*, 111 Cal.App.2d 926, 930; *Cohen v. Citizens National Trust etc. Bank*, 143 Cal.App.2d 480.)" *Robinson v. Robinson*, 187 Cal. App. 2d 677, 681-682; and *Williams v. Wraxall*, 33 Cal. App. 4th 120, 132 (1995).

The Superior Court Judge entered judgment for \$185,813.28 based on the findings and determinations from the arbitration. In the arbitration award, the Hon. Alex Saldamando (Ret.) expressly determined that the failure to disclose facts effecting the real property to the buyer constitutes actual fraud. Arbitration Award, pg. 2:18-22, citing *Lingsch v. Savage*, 213 Cal. App. 2d 729, 735-736 (1963). Judge Saldamando determined that while the Defendants knew of the underground storage tanks, they not only failed to disclose the existence of the tanks, but affirmatively responded "No" in response to the question in the Supplemental Seller Disclosure as to whether there were underground tanks on the Property. Arbitration Award, 3:10-17.

Judge Saldamando found that Defendants were aware of the pipes for the underground storage tanks, had a shoe box positioned over the pipe in the garage, had personal property concealing the pipes in the garage, and added fresh bark underneath the driveway cement cap. The judge concluded,

"[T]hese acts of concealment collectively constitute strong circumstantial evidence that [Defendants] believe or at least feared that further investigation by a prospective buyer would uncover a condition materially affecting the value or desirability of the property..."

Under these circumstances, [Judge Saldamando] finds by a preponderance of the evidence that [Defendants'] failure to disclose the presence of the pipes violates the seller's duty of disclosure and constitutes fraud. (*Lingsch, supra*, at p 736.)

Arbitration Award, 6:18-21, 25-27.

Judge Saldamando further found that the Defendants wrongfully failed to disclose the existence of a public project to expand Highway 101 which negatively affected the property. Arbitration Award, 8:2-4.

The damages awarded are those as permitted for fraud pursuant to California Civil Code § 3343. The award also included the attorneys' fees, costs, and interest arising from and relating to the fraud and damages flowing therefrom.

The court expressly found that sellers committed fraud because of Respondents' failure to disclose the presence of the pipes. The court awarded the damages under a statute that only provides for damages under fraudulent circumstances. Therefore, it appears that the issue of fraud (which has the same elements in a dischargability action) has been decided in a former proceeding. This actual issue was litigated by the same parties in a final decision on the merits. There is no ambiguity in the Judgment made by the arbitrator that he found fraud and issued damages therefrom.

Judge Saldamando necessarily had to determine that all five of the requirement elements for 11 U.S.C. § 532(a)(2) fraud existed to issue the award, and for the judgment entered thereon, for the damages awarded pursuant to California Civil Code § 3343. The Defendants do not offer any legal theory or basis for Judge Saldamando having made his determination other than damages pursuant to California Civil Code § 3343 for fraud arising under California Civil Code § 1709. Rather, they want to reargue the state court judgment, treating this bankruptcy court as a super appellate court which will overrule the judgment entered on the Arbitration Award by the Superior Court Judge.

The full faith and credit requirement of 28 U.S.C. § 1738 compels a bankruptcy court in a §523(a)(2)(A) nondischargeability proceeding to give collateral estoppel effect to a prior state court judgment. *Gayden v. Nourbakhsh*, 67 F.3d 798, 801 (9th Cir. 1995). See *Ormsby v. First American Title Co. (In re Ormsby)*, 591 F.3d 1199, 1205 (9th Cir. 2008).

The bankruptcy court properly gives collateral estoppel effect to the elements of the state law fraud claim that are identical to the elements required for discharge and which were actually litigated or necessarily and determined in the prior action. *Garner*, 498 U.S. at 284.

The State Court Judgment having been based on the actual fraud of the Defendants, the elements of which are the same as fraud arising under 11 U.S.C. § 523(a)(2)(A), the Defendants cannot re-litigate those issues. It has been determined that the Defendants, and each of them, committed (1) misrepresentation, fraudulent omission (non-disclosure) or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor

on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct. The damages flowing from that fraud constitutes all of the damages awarded Plaintiffs in the judgment issued in California Superior Court, County of San Mateo, Case No. 469444, in the judgment amount of \$185,813.28. That judgment, and all obligations arising thereunder, are nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

The Motion for Summary Judgment is granted.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Summary Judgment filed by the Plaintiffs Caroline Serrato and Cheryl Bower having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Summary Judgment is granted, and judgment shall be entered for Plaintiffs and against Defendants, and each of them, that the judgment issued in California Superior Court, County of San Mateo, Case No. 469444, in the judgment amount of \$185,813.28, and all obligations arising thereunder, are nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

14. [08-90957-E-7](#) POWER GENERATION AND
ENGINEERING, INC.
David C. Johnston

OBJECTION TO TRUSTEE'S FINAL
REPORT BY CALIFORNIA
PHYSICIANS' SERVICE
9-9-13 [[461](#)]

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on September 9, 2013. By the court's calculation, 17 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Objection to Trustee's Final Report was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to overrule the Objection to Trustee's Final Report. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

PROCEDURAL ISSUES

California Physicians' Service dba Blue Shield of California ("Movant") filed an Objection to the Trustee's Final Report. However, the Objecting Creditor failed to serve the Objection on either the Debtor or the Debtor's Counsel.

Furthermore, Movant filed the Notice, Objection, and exhibits in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

Lastly, Movant failed to file any evidence in support of its objection.

DISCUSSION

Pursuant to 11 U.S.C. § 503(b), a party may request the allowance of an administrative expense based on the actual, necessary costs and expenses of preserving the estate.

Other than the reference in section 503(a) to the filing of a request for payment of an administrative expense, the Code is silent on the process and procedure for filing such requests. The legislative history indicates that the procedural aspects of allowing administrative expenses are to be left to the Bankruptcy Rules. Unfortunately, the Bankruptcy Rules do not provide specific procedures for the filing of requests for payment of administrative expenses, as they do with regard to the filing of proofs of claim. 4 COLLIER ON BANKRUPTCY ¶ 503.02 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.).

Here, the court granted the Chapter 7 Trustee's request for the court to set a bar date for filing motions for allowance of administrative claims to May 31, 2009. Dckt. 213.

Therefore, even if the court were to overlook the procedural defects of the Objection, it does not appear that Movant has properly asserted an administrative claim in this case, as their request for administrative priority is untimely and Movant has failed to seek permission for an untimely filing.

Therefore, the objection is overruled.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection filed by California Physicians' Service dba Blue Shield of California having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection is overruled.

15. [08-90957](#)-E-7 **POWER GENERATION AND** **MOTION FOR ADMINISTRATIVE**
ESP-1 **ENGINEERING, INC.** **EXPENSES AND MOTION TO PAY**
David C. Johnston 11-21-08 [[134](#)]

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on September 9, 2013. By the court's calculation, 17 days' notice was provided. 14 days' notice is required.

The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party reused a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

Tentative Ruling: The Motion for Administrative Expenses was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion for Administrative Expenses. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

California Physicians' Service dba Blue Shield of California requests payment in full of its "administrative claim" against the Debtor's estate. The motion was originally filed November 21, 2008 and was never set for hearing, until a Notice of Hearing was filed September 9, 2013. Dckt. 463.

Movant argues that the request is timely made because they filed a "Proof of Administrative Claim and Application for Payment" before the May 31, 2009 deadline. Notice, Dckt. 463.

DISCUSSION

Pursuant to 11 U.S.C. § 503, a party may request the allowance of an administrative expense based on the actual, necessary costs and expenses of preserving the estate.

Other than the reference in section 503(a) to the filing of a *request* for payment of an administrative expense, the Code is silent on the process and procedure for filing such requests. The legislative history indicates that the procedural aspects of allowing administrative expenses are to be left to the Bankruptcy Rules. Unfortunately, the Bankruptcy Rules do not provide specific procedures for the filing of requests for payment of administrative expenses, as they do with regard to the filing of proofs of claim. 4 COLLIER ON BANKRUPTCY ¶ 503.02 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.).

Collier on Bankruptcy ¶ 503.02[2] explains,

Although section 503(a) does not expressly provide that tardily filed administrative expense requests are "disallowed," the effect of not permitting the "filing" of a tardy request (except for cause) is that such expenses will not be approved for payment from the estate, because section 503(b) specifies that administrative expenses are allowed only after "notice and a hearing." The "notice and hearing" requirement for allowance of administrative expenses is in contrast to the "deemed" allowance provision of section 502(a) respecting proofs of claim. The phrase "after notice and a hearing," defined in section 102(1), calls for notice and an opportunity for a hearing as is appropriate under the circumstances, but contemplates at least some form of court approval before allowance of any administrative payment from the estate, even as to those requests for payment to which no objection is filed.

Here, the court granted the Chapter 7 Trustee's request for the court to set a bar date for filing motions for allowance of administrative claims to May 31, 2009. Dckt. 213.

However, Movant failed to timely set a hearing in order for the court to determine if there shall be allowed administrative expenses pursuant to 11 U.S.C. § 503(b).

The court does not currently have a "motion" before it, rather a "Proof of Administrative Claim and Application for Payment" appears on the docket. This does not appear to be a request for an administrative expense, but rather a statement that Movant it has an administrative claim.

Based on the foregoing, the Motion is denied.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Administrative Expenses filed by California Physicians' Service dba Blue Shield of California having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied.

16. [13-91463](#)-E-7 PAMELA KROPSCHOT-GUERRERO ORDER TO SHOW CAUSE - FAILURE
 AND ROBERT GUERRERO TO PAY FEES
 Art Hoomiratana 8-23-13 [[9](#)]

Final Ruling: The court issued an order to show cause based on Debtor's failure to pay the required fees in this case (\$306.00 due). The court docket reflects that on August 23, 2013, the Debtor paid the fees upon which the Order to Show Cause was based.

The Order to Show Cause is discharged. No appearance required.

The fees having been paid, the Order to Show Cause is discharged.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Order to Show Cause is discharged, no sanctions are ordered, and the case shall proceed.

17. [13-91464-E-7](#) GUSMARO MADRIGAL MENDOZA MOTION TO ABANDON
EJN-1 AND JIONICIA MADRIGAL 8-29-13 [[18](#)]
Nelson F. Gomez

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service filed on August 29, 2013, states that the Motion and supporting pleadings were served on Debtors', Debtor's Attorney, other parties in interest, and Office of the United States Trustee. By the court's calculation, 28 days' notice was provided. 28 days' notice is required

Final Ruling: The Motion to Abandon Real Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Abandon Real Property is granted and the Trustee is ordered to abandon the property. No appearance required.

Eric J. Nims, the Chapter 7 Trustee requests the court abandon the following property items pursuant to 11 U.S.C. § 554(a) on the grounds that such items are burdensome or of inconsequential value to the estate:

- A. The stock and interests in the incorporated business listed as "Rancho Grande Super Market, Inc." in Line 13, Schedule B, within Debtors' voluntary Chapter 7 Bankruptcy petition filed with the court August 8, 2013.
- B. All inventory, equipment, and tools of the trade associated with the grocery store business commonly known as "Rancho Grande Super Market" located at 13731 San Pablo Avenue, San Pablo, California ("Business"), owned and operated by the corporation listed in Line 13, Schedule B, within Debtors voluntary Chapter 7 bankruptcy petition, to the extent Debtors have any ownership, possessory or other interest in such inventory, equipment or tools of the trade; such inventory, equipment, and tools of the trade are more particularly described as follows:
 1. Six (6) rooftop HVAC condensers and chiller motors and accessories;

2. Three (3) check-out stands;
3. Three (3) point-of-sale machines (cash registers) ;
4. Refrigerated produce display cases (24 feet);
5. One (1) 4ft x 4ft stand-alone refrigerated produce display island;
6. Refrigerated deli/meat display cases (24 feet);
7. Ice machine;
8. Two (2) meat slicers;
9. One (1) meat grinder;
10. Five (5) gas cooktop stoves (each with a single burner);
11. One (1) juicer;
12. Shelving and gondolas used to display dry goods (approximately 80 feet);
13. Miscellaneous cooking utensils (pots, pans);
14. Grocery inventory consisting of dry goods typically found in a small grocery store (e.g. flour, sugar, breakfast cereal, canned fruits and vegetables, paper goods, etc.); and

C. The lease, referenced in Schedule G within Debtors' voluntary Chapter 7 bankruptcy petition, and otherwise described as the Commercial Lease Agreement for the premises commonly known as 13731 San Pablo Avenue, San Pablo, California entered into by and between Debtors and Art Pakpour and Mehrzad Pakpour dated January 22, 2009, as subsequently modified by Tenant and Landlord.

The Trustee argues that he inspected the premises, inventory, equipment and tools of the trade described above and showed them to a group of potential buyers. According to Debtor's petition the value of the stock is \$180,000.00, which the Trustee disputes. Debtors do not exempt the value of the stock. The Trustee states he has been unable to located a buyer for the stock. The Trustee researched the value of the stock is minimal, if any, as the corporation appears to have significant liabilities and the potential buyers have expressed little desire to purchase the stock. The Trustee also states the assets have minimal value because the equipment and tools of the trade were purchased "used" by the Debtors, they are in poor condition and have little current market value, the cost of removing the more valuable equipment items (the HVAC items) would be considerable and the grocery inventory items are deteriorating rapidly and appear to be attracting vermin. Trustee also argues that the lease is month-to-month and the Landlord holds no security deposit relative to the premises, leaving no value to the estate.

DISCUSSION

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000). Here, the Trustee has shown that the property listed above has inconsequential value or benefit to the estate.

Since the property is of inconsequential value to the estate, and the negative financial consequences to the Estate from retaining the property, the court determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Abandon Property filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted and that the personal property identified as:

- A. The stock and interests in the incorporated business listed as "Rancho Grande Super Market, Inc." in Line 13, Schedule B, within Debtors' voluntary Chapter 7 Bankruptcy petition filed with the court August 8, 2013.
- B. All inventory, equipment, and tools of the trade associated with the grocery store business commonly known as "Rancho Grande Super Market" located at 13731 San Pablo Avenue, San Pablo, California ("Business"), owned and operated by the corporation listed in Line 13, Schedule B, within Debtors voluntary Chapter 7 bankruptcy petition, to the extent Debtors have any ownership, possessory or other interest in such inventory, equipment or tools of the trade; such inventory, equipment, and tools of the trade are more particularly described as follows:
 - 1. Six (6) rooftop HVAC condensers and chiller motors and accessories;
 - 2. Three (3) check-out stands;
 - 3. Three (3) point-of-sale machines (cash registers) ;
 - 4. Refrigerated produce display cases (24 feet);
 - 5. One (1) 4ft x 4ft stand-alone refrigerated produce display island;

6. Refrigerated deli/meat display cases (24 feet);
7. Ice machine;
8. Two (2) meat slicers;
9. One (1) meat grinder;
10. Five (5) gas cooktop stoves (each with a single burner);
11. One (1) juicer;
12. Shelving and gondolas used to display dry goods (approximately 80 feet);
13. Miscellaneous cooking utensils (pots, pans);
14. Grocery inventory consisting of dry goods typically found in a small grocery store (e.g. flour, sugar, breakfast cereal, canned fruits and vegetables, paper goods, etc.); and

C. The lease, referenced in Schedule G within Debtors' voluntary Chapter 7 bankruptcy petition, and otherwise described as the Commercial Lease Agreement for the premises commonly known as 13731 San Pablo Avenue, San Pablo, California entered into by and between Debtors and Art Pakpour and Mehrzad Pakpour dated January 22, 2009, as subsequently modified by Tenant and Landlord.

are abandoned to Gumaro R. Madrigan Mendoza and Jionicia C. Madrigal, the Debtors by this order, with no further act of the Trustee required.

18. [11-93765-E-7](#) JACK BIDDLE
[11-9077](#) Jakrun Sodhi
PERKINS V. BIDDLE
TPH-1

MOTION FOR COMPENSATION FOR
THOMAS P. HOGAN, PLAINTIFFS
ATTORNEY(S), FEES: \$27,548.00,
EXPENSES: \$2,093.12
9-11-13 [[61](#)]

No Tentative Ruling.

19. [12-91565](#)-E-7 EVERETT HUNTER
[12-9023](#) Pro Se
EIDSON V. HUNTER, JR.

MOTION FOR COMPENSATION FOR
THOMAS P. HOGAN, PLAINTIFF'S
ATTORNEY(S), FEES: \$14,803.00,
EXPENSES: \$850.20
8-30-13 [[105](#)]

No Tentative Ruling.

20. [10-94467](#)-E-7 TINA BROWN
CWC-4 Michael R. Germain

CONTINUED MOTION FOR CONTEMPT
7-11-13 [[63](#)]

CONT. FROM 8-22-13

Local Rule 9014-1(f)(1) Motion - Continued Hearing.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Tim Brown, Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on July 11, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

No Tentative Ruling: The Motion for Contempt has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The Motion for the Court to Issue an Order to Show Cause why Tim Brown should not be held in contempt or subject to other sanctions is xxxx. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

PRIOR HEARINGS

The Chapter 7 Trustee, Michael D. McGranahan, moves the court for an Order to Show Cause why Tim Brown should not be adjudged in civil contempt for failing and refusing to comply with the Judgment of the court. The Trustee states that the court entered judgment in Adversary Proceeding No. 12-09003 against Tim Brown determining that the following vehicles are property of the bankruptcy estate with a total value of \$42,915.00, which must be turned over by Mr. Brown to the Trustee on or before December 31, 2013:

(a) 1997 Harley Davidson Red Fat Boy Motorcycle, VIN ending in 32282;

(b) 2008 Harley Davidson Cross Bones Motorcycle, VIN ending in 40575; and

(c) 2007 Chevrolet Corvette Automobile, Licence No. 5XYR543, VIN ending in 33800.

The Trustee states that he has made repeated requests to Mr. Brown and his counsel seeking compliance with the Judgment for the turnover of the property, but Mr. Brown has failed and refused to turn over the vehicles.

Additionally, the Trustee states he has incurred attorney's fees in the amount of \$1,593.56 in fees and expenses incurred in employing his counsel to enforce the Judgment.

DISCUSSION

Bankruptcy Courts have the jurisdiction to impose sanctions. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-49 (9th Cir. 2004). The court also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); see also 11 U.S.C. § 105(a).

The primary purpose of a civil contempt sanction is to compensate losses sustained by another's disobedience to a court order and to compel future compliance with court orders. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). The contemtor must have an opportunity to reduce or avoid the fine through compliance. *Id.* The court's authority to regulate the practice of law is broader, allowing the court to punish bad faith or willful misconduct. *Lehtinen*, 564 F.3d at 1058. However, the court cannot issue punitive sanctions pursuant to its power to regulate the attorneys or parties appearing before it. *Id.* at 1059.

Here, the Trustee has shown that Time Brown has failed to comply with the court's Judgment order to turn over the personal property described above. Tim Brown has failed to respond to the Motion as required under Local Bankruptcy Rule 9013-1(f) (1).

CONTINUANCE

The court continued the hearing to issue an order requiring Tim Brown to appear in person at continued hearing on August 22, 2013. The Trustee provided notice of the continued hearing to the court's regular law and motion date for the Modesto Division Courthouse. Dckt. 74.

The court issued an order for Tim Brown to appear in person at the continued hearing, with no telephonic appearance permitted.

The court further ordered that if Time Brown fails to appear, the court shall issue corrective sanctions (in addition to such sanctions as warranted under the present Motion), which may include,

1. \$1,000.00 in corrective monetary sanctions,
2. Ordering the Tim Brown to appear at a further continued hearing, with the failure to do so the basis for

the court issuing further corrective sanctions in the amount of \$2,000.00, and

3. Issuing an order for the U.S. Marshal to take Tim Brown into custody, present him before the court, and hold him in custody until he delivers the items as ordered by the court to the Chapter 7 Trustee.

AUGUST 22, 2013 HEARING

At the August 22, 2013 hearing Tim Brown and his counsel, David Foyil appear as counsel for Tim Brown. At the hearing, David Foyil and Tim Brown offered the following explanations as to why the court's prior judgment and order for the turn over of the vehicles had not been complied with by Tim Brown.

- A. After the entry of the judgment Tim Brown and his representatives, communicated with the Trustee about Tim Brown purchasing the vehicles from the Trustee rather than turning them over to the Trustee.
- B. Because there are liens on (at least some of) the vehicles, Tim Brown thought that he could retain possession of them so long as he made monthly payments on those obligations.
- C. Tim Brown spoke with some attorney (it not being made clear the identify of the attorney) who is purported to have told him that he could retain possession of the vehicle notwithstanding this court's judgment and order for possession.
- D. Tim Brown represented to the court and Trustee that the 2008 Harley Davidson was "run over" and is "in pieces" at a number of different locations. Tim Brown also represented that he did not maintain insurance on the 2008 Harley Davidson which he did not turn over to the Trustee.
- E. When the attorney for the Trustee unequivocally communicated to David Foyil (counsel for Mr. Brown) that the negotiations with Mr. Brown were concluded when Mr. Brown had failed to provide payment to the Trustee for the vehicles, Mr. Foyil reports that it was his office who failed to communicate with Tim Brown to turn over the vehicles. Mr. Foyil agrees to pay the \$1,593.56 in legal fees incurred by the Trustee.

The court appreciates that both David Foyil and Tim Brown have appeared at the court hearing on August 22, 2013, and did not require the U.S. Marshal to otherwise waste time and resources to take Mr. Brown into custody and present him in court as ordered. The court does not find reasonable Tim Brown's contentions that he thought he did not have to comply with the judgment and order of this court to turn over the vehicles. To the extent that Tim Brown's failure to comply with the judgment and order is or becomes relevant, such will be determined in subsequent proceedings.

The court found Tim Brown has failed to comply with the Judgment and Order of this Court ("December 13, 2012 Judgment and Order"). Adv. Proc. 12-9003,

Dckt. 41. Compliance with federal court judgments and orders is not optional. This court has the power and authority to compel compliance with orders and judgments through the issuance of corrective sanctions. *Price v. Lehtinen (in re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); 11 U.S.C. § 105(a), addressing the inherent civil contempt power exercised by judgments of the bankruptcy court.

The primary purpose of a civil contempt sanction is to compensate losses sustained by another's disobedience of a court order and to compel future compliance with court orders. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). The contemtor must have an opportunity to reduce or avoid the fine through compliance. *Id.* The federal court's authority to regulate the practice of law is broader, allowing the court to punish bad faith or willful misconduct. *Price v. Lehitine*, 564 F.3d at 1058. However, the bankruptcy court cannot issue punitive sanctions pursuant to its power to regulate the attorneys or parties appearing before it. *Id.* at 1059.

It is necessary and appropriate for the exercise the civil contempt power of this court to enforce the December 13, 2012 Judgment and Order. David Foyil shall pay the Chapter 7 Trustee \$1,593.56 to compensate the estate for the legal fees and expenses incurred in connection with the present Motion caused by Tim Brown failing to comply with the December 13, 2012 Judgment and Order. This is ordered as the payment of expenses incurred and not as "sanctions" against counsel.

It is also necessary and appropriate to order corrective monetary sanctions, to be paid, if Tim Brown fails to comply with the order issued by the court pursuant to this Motion. To the extent that Tim Brown suffered from any "confusion" (whether created in his own mind or by unnamed persons), there is no confusion that the court has ordered him, in open court at the August 22, 2013 hearing to turn over the following vehicles:

- A. The 1997 Harley Davidson Red Fat Boy Motorcycle, shall be delivered by Tim Brown to the Trustee at Huisman Auctions, inc., 13070 W. Stockton Blvd., Galt, California, during regular business hours on or before 4:00 p.m. on August 28, 2013.
- B. The 2007 Chevrolet Corvette Automobile, License No. 5XYR543, VIN IGIYY26U575133800, shall be delivered by Tim Brown to the Trustee at Huisman Auctions, inc., 13070 W. Stockton Blvd., Galt, California, during regular business hours on or before 4:00 p.m. on September 4, 2013.
- C. With each vehicle, Tim Brown shall turn over the current registration, title documents, the names of any lien holders, and contact information for such lien holders.

The court does not issue a further order at this time for the turn over of the 2008 Harley Davidson which is asserted to be "in pieces." The December 13, 2012 Judgment and Order includes a monetary judgment amount for each vehicle, which may be enforced by the Trustee. The court leaves it to the Trustee to determine if the "in pieces" 2008 Harley Davidson should be turned over, or if the Trustee believes that he should enforce the monetary judgment to recover the value of this vehicle which Tim Brown retained possession of and did not insure.

As corrective sanctions, the court shall order Tim Brown to pay \$2,500.00 if he fails to timely turn over the 1997 Harley Davidson Red Fat Boy Motorcycle and a separate \$2,500.00 if Tim Brown fails to timely turn over the 2007 Chevrolet Corvette Automobile. Tim Brown may avoid paying the corrective sanctions by complying with this order of the court. The court has set the deadlines for the turn over of the two vehicles after confirming with Tim Brown and his counsel in open court that such vehicles can be so delivered by Mr. Brown.

The court continued the hearing on this Motion to September 26, 2013 at 10:30 a.m. to obtain confirmation that both vehicles have been turned over and whether the corrective sanctions must be ordered because of his future non-compliance.

SEPTEMBER 26, 2013 HEARING

On September 4, 2013, the Trustee filed a report of sale of the Debtor's 2004 Harley Davidson Duece Softtail back to the Debtor Tina M. Brown for a total sum of \$5,000.00. Dckt. 80.

On September 24, 2013, the Trustee filed a Report stating that as of September 24, 2013, Tim Brown failed to turn over possession of the 1997 Harley Davidson Red Fat Boy Motorcycle and the 2007 Chevrolet Corvette Automobile.

The Trustee also reports that the documents provided to him by counsel for Tim Brown demonstrate that on or about May 1, 2013, Tim Brown encumbered the 2007 Corvette and 1997 Harley Davidson by purporting to grant Francine Phillips a security interest in the vehicles. This granting of a security interest was in violation of the automatic stay and contrary to the court's December 31, 2013 judgment.

The court further ordered David Foyil to pay the Trustee, on behalf of the estate, \$1,593.56 on or before September 23, 2013. As of September 24, 2013, Mr. Foyil failed to make the payment.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Contempt filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is xxxx.

21. [12-92576-E-7](#) MICHAEL/LAURA KELLOGG
ADJ-4 Thomas P. Hogan

MOTION FOR COMPENSATION FOR
ATHERTON AND ASSOCIATES, LLP,
ACCOUNTANT(S), FEES: \$1,794.00,
EXPENSES: \$0.00
8-29-13 [[47](#)]

DISCHARGED 1-7-13

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors', Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 29, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Michael D. McGranahan, Chapter 7 Trustee on behalf of Atherton & Associates LLP, Certified Public Accountants, makes a Final Request for the Allowance of Fees and Expenses for accounting services in this case. The period for which the fees are requested is for the period February 11, 2013 through August 14, 2013. The order of the court approving employment of counsel was entered on March 12, 2013.

Description of Services for Which Fees Are Requested

[Correspondence]: Accountant .9 hours on correspondence to obtain information necessary for preparation of the federal and state fiduciary tax returns.

[Tax Preparation]: Accountant spent 4.9 hours in preparation of federal and state fiduciary tax returns for the bankruptcy estate.

[Tax Planning]: Accountant spent 1.6 hours to project the tax upon the sale of the Shares.

[Fee Application]: Accountant spent .4 hours preparing a draft fee application.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit of the Estate

A review of the application shows that Accountant's services rendered a successful projection of taxes on the sale of the shares and the filing of federal and state tax returns on behalf of the estate.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$230.00/hour for accountant for 7.8 hours. The court finds that the hourly rates reasonable and that Accountant effectively used appropriate rates for the services provided. The total Accountant' fees in the amount of \$1,794.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Accountant is allowed, and the Trustee is authorized to pay, the following amounts as compensation as a professional in this case:

Accountant' Fees	\$1,794.00
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For a total final allowance of \$1,794.00 in Accountant' Fees and Costs in this case.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Allowance of Fees and Expenses filed by the Chapter 7 Trustee on behalf of the Accountant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Atherton & Associates LLP is allowed the following fees and expenses as a professional of the Estate:

Atherton & Associates LLP, Accountant for the Estate
Applicant's Fees Allowed in the amount of \$1,794.00

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

22. [12-92576-E-7](#) MICHAEL/LAURA KELLOGG
ADJ-5 Thomas P. Hogan

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF JOHNSTON AND
JOHNSTON LAW CORP. FOR ANTHONY
D. JOHNSTON, TRUSTEE'S
ATTORNEY(S), FEES: \$5,675.00,
EXPENSES: \$225.96
8-30-13 [[54](#)]

DISCHARGED 1-7-13

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors', Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 30, 2013. By the court's calculation, 27 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Final Application for Fees. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

FEES REQUESTED

Anthony D. Johnston, Counsel for the Michael D. McGranahan, Chapter 7 Trustee, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period December 17, 2012 through August 29, 2013. The order of the court approving employment of counsel was entered on December 20, 2012.

Description of Services for Which Fees Are Requested

[Asset Analysis & Recovery]: Counsel spent 1.9 hours in this category. Counsel reviewed the Petition, Schedules, Statement of Financial affairs for the Debtors. Counsel also reviewed balance sheets and communicated with Debtors'

counsel and certified public accountant for Kellogg Environmental and Ron's Water Trucks.

[Asset Disposition]: Counsel spent 12.4 hours in this category. Counsel prepared Stock Purchase and Sell Agreement as well as motions for authority for sale of stock in Kellogg Environmental, Inc. and for Ford F250. Counsel prepared the documents to transfer the shares of stock in Kellogg Environmental, Inc. and Ford truck.

[Fee/Employment Application]: Counsel spent 8.4 hours in this category. Counsel prepared application for order for employment of counsel, and application for allowance of compensation and reimbursement of costs advanced.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services undertaken as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

(a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that Counsel's services rendered a successful recovery and disposition of assets for the benefit of the estate. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$250.00/hour for counsel for 22.7 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$5,675.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$225.96 for copies and postage. The total costs in the amount of \$225.96 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel is allowed, and the Trustee is authorized to pay, the following amounts as compensation as a professional in this case:

Attorneys' Fees	\$ 5,675.00
Costs and Expenses	\$ 225.96

For a total final allowance of \$5900.96 in Attorneys' Fees and Costs in this case.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Anthony D. Johnston is allowed the following fees and expenses as a professional of the Estate:

Anthony D. Johnston, Counsel for Michael D. McGranahan, Chapter 7 Trustee

Applicant's Fees Allowed in the amount of \$ 5,675.00
Applicants Expenses Allowed in the amount of \$ 225.96,

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

23. [13-91578-E-7](#) AUNDREA LECHER
BPC-1 Tammie L. Cummins

MOTION TO COMPEL ABANDONMENT
9-12-13 [[11](#)]

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on September 12, 2013. By the court's calculation, 14 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Abandon Real Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny without prejudice the Motion to Abandon Real Property. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtor, Aundrea R. Lecher, moves the court for an order compelling abandoning of the estate's interest in the Debtor's business "Aundrea R. Lecher, Independent Hair Stylist" and the business assets consisting of machinery and supplies on the grounds that the business, machinery and supplies is of inconsequential value and benefit to the estate.

Debtor asserts that she has placed values of these assets in the aggregate total of \$3,520.00 and has claimed exemption totaling \$3,520.00 against the values of the business assets.

The Chapter 7 Trustee filed a statement of non-opposition.

DISCUSSION

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

Here, Debtor has failed to provide description of the property being abandoned. The court will not issue vague orders abandoning personal property that is not specifically named in the motion and supporting pleadings.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Abandon Property filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is denied without prejudice.

24.	<u>12-92479-E-12</u> DAVID/ESPERANZA AGUILAR NFG-1 Nelson F. Gomez	CONTINUED MOTION TO VALUE COLLATERAL OF ONEWEST BANK, FSB 7-11-13 [38]
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CONT. FROM 8-22-13

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 12 Trustee, respondent creditor, and Office of the United States Trustee on July 11, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Value Collateral has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to continue the hearing on the Motion to Value to 10:30 a.m. on October 31, 2013. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

PRIOR HEARING

Debtor seeks to value the collateral securing Debtor's indebtedness to OneWest Bank, FSB on Debtor's first mortgage and deed of trust on the business real property commonly known as 5001 W. Monte Vista Avenyue, Denair, California.

The motion is accompanied by the Debtor's declaration. The Debtor seeks to value the property at a fair market value of \$81,260.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. See Fed. R. Evid. 701; see also *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Debtor also offers the Declaration of Jose L. Valencia, a licensed real estate broker, who opines that the value of the property is \$81,260.00.

CREDITOR'S OPPOSITION

Creditor Deutsche Bank National Trust Company, as Trustee of Indymac Loan Trust Mortgage Backed Certificates Series 2004-11 Under the Pooling and Servicing Agreement Dated June 1, 2004, as serviced by OneWest Bank, FSB opposes the Debtor's Motion to Value. Creditor filed Proof of Claim No. 1 in the amount of \$179,923.80, including an arrearage.

Creditor believes that the value of the property is \$150,000.00. Creditor offers the Declaration of David Tafolla Aguilar, a licensed real estate agent with 14 years' experience, who opines that the value of the property is \$150,000.00.

Creditor seeks a continuance to procure an appraisal or other expert evaluation of the property.

The hearing on the Motion to Value was continued to allow the parties to obtain appraisals on the subject real property.

CONTINUANCE

The parties filed a Stipulation to continue the hearing to October 31, 2013. The court issued an order granting the continuance on September 17, 2013. Dckt. 52.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Valuation of Collateral filed by Debtor(s) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion to Value is continued to 10:30 a.m. on October 31, 2013.

25. [08-92380](#)-E-7 NICHOLAS/KATHRYN GRIGGS MOTION FOR COMPENSATION FOR
KJL-6 Estela O. Pino KENNETH JOHN JORGENSEN,
 TRUSTEE'S ATTORNEY(S), FEES:
 \$12,061.50, EXPENSES: \$254.45
 8-14-13 [[227](#)]

DISCHARGED 2-17-09

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors', Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 14, 2013. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

Final Ruling: The Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Final Application for Fees is granted. No appearance required.

FEES REQUESTED

Kenneth Jorgensen Law, P.C., Counsel for the Michael D. McGranahan, Chapter 7 Trustee, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period May 10, 2010 through September 26, 2013. The order of the court approving employment of counsel was entered on June 11, 2010.

Description of Services for Which Fees Are Requested

Case Administration: Counsel spent 1.6 hours in this category for total fees of \$408.00. Counsel reviewed the case file and emails from former personal injury attorney.

Personal Injury Claim: Counsel spent 14.2 hours in this category for total fees of \$3621.00. Counsel prepared contingency fee agreement and Substitution of Attorney for Trustee. Counsel reviewed Stipulation for Disbursement of Personal Injury Settlement Proceeds, Statement of Position and

Statement of Settlement. Counsel communicated with various parties involved through telephone conferences, letters and emails.

Medical Claim Issue: Counsel spent 3.4 hours in this category for total fees of \$867.00. Counsel communicated with various parties through email, telephone conferences and letters regarding medical lien issue, stipulation to continue hearing, application to intervene in action and continuing hearing date.

Exemption Issue: Counsel spent 7.2 hours in this category for total fees of \$1836.00. Counsel reviewed Debtors' 703 exemptions and Schedule C. Counsel drafted Stipulation and Order. Counsel communicated with various parties through email, telephone conferences and letters regarding exemption issues.

Motion for Authority to Settle a Personal Injury Complaint: Counsel spent 8.3 hours in this category for total fees of \$2116.50. Counsel prepared Motion for Authority to Settle Personal Injury Claim, a Reply in Support of Motion to Authorize Compromise and Notice of Entry of Order on Trustee's Motion for Authority to Settle Personal Injury Claim. Counsel made a telephonic appearance for Motion for Authority to Settle a Personal Injury.

Fee and Employment: Counsel spent 12.6 hours in this category for total fees of \$3213.00. Counsel prepared Application to Employ Bankruptcy Counsel and Application for Approval and Payment of Final Fees, Costs and Expenses. Counsel made telephonic appearance at hearing.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

- (i) unnecessary duplication of services; or
- (ii) services that were not--
 - (I) reasonably likely to benefit the debtor's estate;
 - (II) necessary to the administration of the case.

11 U.S.C. § 330(a) (4) (A) .

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services undertaken as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

- (a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?
- (b) To what extent will the estate suffer if the services are not rendered?
- (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that Counsel's services rendered a successful handling of personal injury, medical claim and exemption issues for the benefit of the estate.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$255.00/hour for counsel for 47.3 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$12,061.50 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$254.45 for copies and postage. The total costs in the amount of \$254.45 are approved and authorized to be paid by the Trustee from

the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel is allowed, and the Trustee is authorized to pay, the following amounts as compensation as a professional in this case:

Attorneys' Fees	\$12,061.50
Costs and Expenses	\$ 254.45

For a total final allowance of \$12,315.95 in Attorneys' Fees and Costs in this case.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Kenneth Jorgensen Law, P.C. is allowed the following fees and expenses as a professional of the Estate:

Kenneth Jorgensen Law, P.C., Counsel for the Estate
Applicant's Fees Allowed in the amount of \$12,061.50
Applicants Expenses Allowed in the amount of \$254.45,

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

26. [13-90481-E-7](#) HENRY STACHER
[13-9022](#) Eric K. Alford
STACHER V. STACHER

MOTION TO SET ASIDE AND MOTION
TO CONTINUE FOR ANSWER
8-7-13 [[13](#)]

Final Ruling: The Debtor having filed a Withdrawal of the Motion to Set Aside Entry of Default, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the Motion to Set Aside Entry of Default was dismissed without prejudice, and the matter is removed from the calendar.**

27. [13-91382-E-7](#) JENNIFER FLORES MOTION TO COMPEL
PLG-1 Rabin J. Pournazarian 8-22-13 [[13](#)]

Local Rule 9014-1(f) (1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on August 22, 2013. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Compel has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f) (1) (ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to deny the Motion to Compel Turnover without prejudice. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtor states that CACH, LLC levied a total of \$4,372.50 from Debtor's Wells Fargo Accounts on June 10, 2013. Debtor states that the Contra Costa County Sheriff's Department is holding funds totaling \$4,372.50 and has not yet disbursed the funds to CACH, LLC. Debtor states the Debtor filed an Amended Schedule B and C listing the monies and exempting them. The Debtor requests an order from this court directing the Sheriff's department to turn over the \$4,372.50.

However, Debtor fails to provide the legal authority for the court to order a third party to turnover property. Pursuant to Local Bankruptcy Rule 9014-1(d) (5), each motion, opposition and reply shall cite the legal authority relied upon by the filing party. Injunctive relief must be sought thorough an adversary proceeding unless otherwise expressly provided by the Bankruptcy Code or Rules.

More importantly, Debtor failed to provide any admissible evidence in support of her contentions. While the Motion attempts to authenticate the attached documents, this is not proper. No declarations have been filed in support of the pleadings. Therefore, the court does not have any evidence before it and the motion is denied without prejudice.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Compel Turnover filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

28. [13-90284-E-7](#) **SAWYERS HEATING AND AIR** **ORDER TO SHOW CAUSE**
RHS-1 **CONDITIONING, INC.** **8-27-13 [43]**
Pro Se

CASE DISMISSED 8/8/13

Notice Provided: The Order to Show Cause was served by the Clerk of the Court through the Bankruptcy Noticing Center on the parties, on August 28, 2013. 29 days notice of the hearing was provided.

No Tentative.

BACKGROUND

Sawyers Heating and Air Conditioning, Inc. is a repeat bankruptcy filer in this District. The Debtor's first foray into bankruptcy was the filing of a voluntary Chapter 11 case on August 9, 2012, Case No. 12-92191 ("First Chapter 11 Case"). The First Chapter 11 Case was dismissed on September 24, 2012. The Debtor then filed a second bankruptcy case on November 8, 2012, Case No. 12-92905 ("Second Chapter 11 Case"). The Second Bankruptcy Case was dismissed on November 20, 2012.

PRIOR VOLUNTARY CASES COMMENCED BY DEBTOR

First Chapter 11 Case

In the First Chapter 11 Case the Debtor was represented by counsel, Robert D. Rodriguez. The Debtor failed to file the Attorney Disclosure Statement, List of 20 Largest Unsecured Creditors, List of Equity Security Holders, Schedules, Statement Re: Corporate Debtor, and Statement of Financial Affairs. The Clerk of the Court issued a Notice of Incomplete Filing, which required that the documents be filed by August 16, 2012, or the case would be dismissed. Notice, 12-92191 Dckt. 3.

The Debtor filed an *ex parte* motion for an extension of time to file these basic documents. Motion, *Id.* Dckt. 9. In the *ex parte* motion the Debtor, individually and as the Debtor in Possession, asserted the following grounds for the extension of time:

- A. The Debtor and Debtor in Possession have and are allocating significant time and resources to emergency motions such as (1) emergency motion to limit notice, (2) emergency motion for authorizing the sale of personal property, and (3) emergency points and authorities.

- B. Debtor's and Debtor's in Possession counsel testified under penalty of perjury that a significant amount of time and resources were being expended to prepare and provide the required information to the Chapter 7 Trustee.
- C. The business staff for the Debtor in Possession has been reduced from pre-bankruptcy filing levels.
- D. The management of the Debtor and Debtor in Possession has acted diligently to prepare the Schedules and is making progress.
- E. The Debtor seeks an extension of two weeks, until September 6, 2012, to complete and file these documents.

Ex parte Motion, *Id.* The court granted the Motion, extending the time to file these documents through and including September 7, 2012. Order, *Id.* Dckt. 12.

On September 7, 2012, the Debtor and Debtor in Possession filed an almost identical *ex parte* motion seeking a further extension of time. *Ex parte* motion, *Id.* Dckt. 21. The further information was added that the Debtor's and Debtor's in Possession bookkeeper quit her employment on September 3, 2012. The court granted the Debtor a further extension through and including September 21, 2012, to file the required documents. Order, *Id.* Dckt. 24. The court granted the *ex parte* motion for a further extension of time notwithstanding the objection of the U.S. Trustee. Objection, *Id.* Dckt. 25.

Though the court granted two extensions of the time to file the basic documents required in a Chapter 11 case, none of the documents were filed by the September 21, 2012 deadline. This failure occurred even though the Debtor and its counsel on two occasions represented to the court that they were diligently working on and would complete the documents. The First Chapter 11 Case was dismissed by order filed on September 24, 2012. Order, *Id.* Dckt. 29.

The Voluntary Bankruptcy Petition filed in the First Chapter 11 Case was filed by Weston G. Sawyer as president of Sawyers Heating & Air, Inc.

Second Chapter 11 Case

The Debtor commenced the Second Chapter 11 Case on November 8, 2012. This was 91 days after the August 9, 2012 filing of the First Chapter 11 Case. For this case, the Debtor and Debtor in Possession are represented by Richard Dwyer. Though the Debtor had represented in the First Chapter 13 Case that it was working diligently on preparing the Schedules and Statement of Financial Affairs, it failed to file the following documents: (1) List of 20 Largest Unsecured Creditors, (2) List of Equity Security Holders, (3) Schedules, (4) Statement of Corporate Debtor, and (5) Statement of Financial Affairs. On November 8, 2012, the Clerk of the Court issued a Notice of Incomplete Filing in the Second Chapter 11 Case. 12-92905, Dckt. 2. No further action was taken, and the Second Chapter 11 Case was dismissed on November 20, 2012. Order, *Id.* Dckt. 10.

The Voluntary Chapter 11 Petition was signed by Weston G. Sawyer as president of Sawyers Heating & Air, Inc.

PRESENT INVOLUNTARY CHAPTER 7 CASE

On February 15, 2013, Heating and Cooling Supply, LLC (signed by Greg Kooyman) filed an Involuntary Chapter 7 Petition, commencing the bankruptcy case now before the court ("Chapter 7 Case"). The attorney signing the petition as counsel for Heating and Cooling Supply, LLC is William C. Hernquist II. Petition, Dckt. 1. The court filed the order for relief in the Chapter 7 Case on May 16, 2013. Dckt. 4.

The Debtor was ordered to file (1) Schedules, (2) Statement of Financial Affairs, and (3) Statement of Corporate Ownership. Order, Dckt. 7. These documents (which the Debtor had been diligently working on preparing since August 9, 2012) were due on or before May 30, 2013. None of these documents were filed by the Debtor.

On July 3, 2013, the Chapter 7 Trustee filed a motion to dismiss the involuntary bankruptcy case because of the failure of the Debtor to appear at the First Meeting of Creditors. Motion, Dckt. 31.

Because of the multiple bankruptcy filings by the Debtor and Heating and Cooling, LLC commencing this involuntary Chapter 7 Case, the court did not dismiss the case but issued an order for the attorneys who have represented the Debtor and the petitioning creditor, Weston Sawyer, and the person signing the Involuntary Chapter 7 Petition for Heating and Cooling Supply, LLC to appear and address for the court why this bankruptcy case is not being prosecuted. Order to Appear, Dckt. 34. The order required the following persons to appear at the August 1, 2013 hearing, with telephonic appearance permitted:

Weston Sawyer, President
Greg Kooyman, Director of Credit
William C. Hernquist II, Esq.
Robert D. Rodriguez, Esq.
Richard E. Dwyer, Esq. FN.1.
Michael D. McGranahan, Trustee

FN.1. Upon review of the prior order and certificate of service, the court notes that Mr. Dwyer was not served at his office in Mountain View, California. It appears that an addressed used for another Richard Dwyer was used by the Bankruptcy Noticing Center for service. The court does not include the Richard E. Dwyer who filed the Second Chapter 11 Case in this Order to Show Cause.

Only Robert D. Rodriguez appeared at the August 1, 2013 hearing as ordered by the court. The court found that Weston Sawyer, Greg Kooyman, and William C. Hernquist II violated the order of the court and failed to appear at the August 1, 2013.

FAILURE TO COMPLY WITH ORDER OF COURT

The court ordered the parties who were active in filing the prior bankruptcy cases and the Involuntary Chapter 7 Case to appear at the August 1, 2013 hearing. Significant concern has been raised through the repeated accessing of the federal judicial power through the Bankruptcy Code and then either the failure to perform as expressly represented (in the First Chapter 11 Case), as ordered (in the Chapter 7 Case), failing to prosecute an involuntary bankruptcy

case as the petitioning creditor, and then failure to appear as ordered by the court.

Compliance with orders of the court is not optional. In setting the August 1, 2013 hearing, the court permitted telephonic appearances so that all persons could easily appear and provide their good faith, *bona fide* responses to address the court's concerns. Other than Mr. Rodrigues (who appeared in person), none of the other persons ordered to appear complied with the court's order. This raises even more concerns that nefarious, improper, and unethical conduct is afoot in these repeated bankruptcy filings.

Bankruptcy courts have jurisdiction and the authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548-549 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (in re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); see 11 U.S.C. § 105(a).

Federal Rule of Bankruptcy Procedure 9011 imposes obligations on both attorneys and parties appearing before the bankruptcy court. This Rule covers pleadings filed with the court. If a party or counsel violates the obligations and duties imposed under Rule 9011, the bankruptcy court may impose sanctions, whether pursuant to a motion of another party or *sua sponte* by the court itself. These sanctions are corrective, and limited to what is required to deter repetition of conduct of the party before the court or comparable conduct by others similarly situated.

A bankruptcy court is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); see, *Price v. Lehitine*, 564 F. 3d at 1058.

The primary purpose of a civil contempt sanction is to compensate losses sustained by another's disobedience of a court order and to compel future compliance with court orders. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). The contemtor must have an opportunity to reduce or avoid the fine through compliance. *Id.* The federal court's authority to regulate the practice of law is broader, allowing the court to punish bad faith or willful misconduct. *Price v. Lehitine*, 564 F.3d at 1058. However, the bankruptcy court cannot issue punitive sanctions pursuant to its power to regulate the attorneys or parties appearing before it. *Id.* at 1059.

Two attorneys, the principal of the Debtor (who has executed two prior bankruptcy petitions and has been working on the Schedules and Statement of Financial Affairs diligently since August 2012), and the person executing the involuntary petition all have chosen not to comply with this court's order to appear for the August 1, 2013 hearing. It is necessary and proper for this court to impose monetary and non-monetary sanctions of a sufficient amount by which each of these persons will comply with orders of the court in the future. These sanctions are not to punish the persons for failing to appear, but be of such measured amount that they will comply in the future.

The court has determined that it is necessary to conduct a further hearing, at which time each of the persons be present for the court to assess the credibility of their responses and that the sanctions, as ordered, will work to correct the conduct of each person in the future. The amount of the monetary sanction which the court believes necessary for the persons to correct their conduct in the further is \$2,500.00. This amount will be considered by the court, in light of the responses filed by each person and the presentation of their response at the hearing, as to whether the dollar amount should be higher or lower.

If the persons fail to comply with this order to show cause and fail to appear at the hearing, the court will then consider what higher dollar amount of corrective sanction is appropriate to have the noncomplying person or person correct their conduct, as well as whether a corrective suspension of the authorization to file pleadings electronically by the attorneys is a necessary and effective corrective sanction.

Additionally, for the person or persons not complying with this order, the court will consider whether this conduct should be certified to the United States District Court for further corrective and punitive sanctions, including punitive dollar sanctions of an amount not less than \$20,000.00 and the suspension of the admission to practice law before the federal courts in the Eastern District of California for a period of not less than one year.

ORDER

The court ordered the following to appear at the hearing:

- A. Weston Sawyer;
- B. Greg Kooyman, Individually as the person signing the Involuntary Bankruptcy Petition for the Petitioning Creditor;
- C. Cooling and Heating Supply, LLC, through Manager Barry Logan, Petitioning Creditor; and
- D. William C. Hernquist II, Esq., Attorney for the Petitioning Creditor,

to show cause as to why the court should not issue corrective sanctions in the amount of \$2,500.00 to be paid by each of them. Any award of sanctions, if not timely paid, may be enforced by the Chapter 7 Trustee or Clerk of the Court in the same manner as a judgment issued by this court. This includes, without limitation, the assignment to third-party collection agencies or attorneys to enforce and recover the monetary obligations.

RESPONSE OF WILLIAM C. HERNQUIST

William C. Hernquist, II filed an Affidavit in response to the Order to Show Cause on September 12, 2013. Mr. Hernquist is the attorney for petitioner Heating and Cooling Supply, LLC.

Mr. Hernquist states the filing of the Chapter 7 petition was to elicit the Trustee's powers, including his investigative powers to identify collect and

liquidate estate property. Counsel testifies that between February 15, 2013 and July 3, 2013, he worked with his client, persons knowledgeable of the Debtor's affairs and the Trustee to gather information to assist the handling of this matter. Counsel states Debtor and its President, Wes Sawyer appeared to be continuing business and have assets "stashed" in various locations around Modesto and posting pictures on the internet of a significant amount of cash, but neither seemed concerned in the bankruptcy proceedings. Counsel states that they refused to participate in the matter by refusing to submit Schedules, Statement of Financial Affairs and a statement of corporate ownership or to appear for the first meeting of creditors.

Counsel states that after the Trustee filed his motion to dismiss, the client decided that it would not be able to obtain the assistance of the Trustee and wanted to dismiss the petition. Counsel prepared and directed his paralegal to file a request for dismissal of the petition on July 16, 2013. Counsel then received the Order to Appear on July 22, 2013. Counsel then asked his paralegal to contact the court and inquire if the August 1, 2013 hearing was going forward or if the dismissal had been entered and was informed that the hearing was off calendar. Based on this, Counsel states that he did not appear at the hearing. Counsel states he terminated his paralegal for performance related issues and did not know the extent of her failings and did not know the August 1, 2013 hearing was held.

Counsel states at the receipt of this order on August 27, 2013, did he learn of the prior hearing and that the Request for Dismissal was never filed. Had he known about the prior hearing, Counsel states that he and Mr. Kooyman would have attended. Counsel states that he takes full responsibility and that should sanctions be ordered, they should be ordered against him only, not his client.

29. [13-90290](#)-E-7 ORVILLE/EDLYN SMITH
MTM-1 Michael T. McEnroe

MOTION TO AVOID LIEN OF
WACHOVIA DEALER SERVICES AND
CALAVERAS TAX COLLECTOR
8-29-13 [[27](#)]

DISCHARGED 6-3-13

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors', Debtor's Attorney, Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on August 28, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Avoid a Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid a Judicial Lien is granted. No appearance required.

Debtor states that a judgment was entered against the Debtor in favor of Wachovia Dealer Services, Inc (formerly WFS Financial, Inc.) for the sum of \$11,425.53. The abstract of judgment was recorded with Calaveras County on October 8, 2010. That lien attached to the Debtor's residential real property commonly known as 2844 Oak Haven, West Point, California.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$5,000.00 as of the date of the petition. The unavoidable consensual liens total \$2,423.37 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of \$2,600.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the judgment lien of Wachovia Dealer Services, Inc., Calaveras County Superior Court Case No. 10CV8534, Document No. 2010 12070, recorded on October 8, 2010, with the Calaveras County Recorder, against the real property commonly known as 2844 Oak Haven, West Point, California, APN 010-021-062, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.